Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Arthur F. Quern, Director of the Illinois Department of Public Aid, respectfully prays that a Writ of Certiorari issue to review the *En Banc* Order and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on October 19, 1977.

OPINIONS BELOW

This case was previously before the United States Supreme Court on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as *Edelman v. Jordan*, 415 U.S. 651 (1974), in which this Court reversed and remanded the cause for further proceedings consistent with the opinion. On remand there have been three opinions below. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, is reported as *Jordan v. Trainor*, 405 F.Supp. 802 (N.D.Ill. 1975) and is included herein as Appendix A. The opinion of a three-judge panel of the United States Court of Appeals for the Seventh Circuit is reported as *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977) and is included herein as Appendix B. The *en banc* opinion of the United States Court of Appeals for the Seventh Circuit is not reported and is included herein as Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit (three-judge panel) was entered on March 10, 1977. A Petition for Rehearing *en banc* was granted on April 25, 1977. On October 19, 1977, the United States Court of Appeals for the Seventh Circuit entered its *en banc* opinion and judgment. This Petition for a Writ of Certiorari is filed within 90 days of the date of the entry of that order. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the Eleventh Amendment to the United States Constitution a jurisdictional bar to the exercise of a federal court's equitable powers to award retrospective relief against a non-consenting sovereign state in the form of a class notice regarding entitlement to retroactive benefits?

2. Has the law of this case as established by the Supreme Court in *Edelman* been circumvented and eviscerated by the *en banc* order and judgment of the Court of Appeals?

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

STATEMENT OF THE CASE

The present controversy in this extensively litigated case concerns the scope of the Eleventh Amendment of the United States Constitution as a jurisdictional bar to the exercise of a federal court's equitable power to fashion retrospective relief against a non-consenting sovereign state. At issue, in particular, is the power of the District Court to order Illinois to notify some twenty thousand members of the plaintiff class of their possible entitlement to retroactive benefits, an order which artfully seeks to evade the jurisdictional bar of the Eleventh Amendment and which eviscerates the law of this case as established by this Court in *Edelman v. Jordan*, 415 U.S. 651 (1974).

In 1971 Respondent filed a Complaint for equitable and monetary relief which alleged that the State Defendants, in administering Illinois' Aid to the Aged, Blind and Disabled Program (AABD), failed to comply with federally mandated time limits for processing AABD applications for assistance. The relief requested in the Complaint was both prospective and retrospective: prospective injunctive relief to require the Defendant to conform his conduct in the future to federal law; and retroactive relief in the form of court-ordered payments of withheld benefits to compensate members of the Plaintiff Class for the State's tardy processing procedures.

The Eleventh Amendment issue previously before this Court arose out of the trial court's permanent injunction entered March 15, 1972, which, *inter alia*, ordered the state officials to release and remit AABD payments

wrongfully withheld, by reason of delay, from members of the Plaintiff Class, defined in the District Court's Judgment Order as all applicants for AABD in the State of Illinois who applied for assistance between July 1, 1968, and April 16, 1971, and who did not receive their initial check within the applicable federal time limits.

On Petitioner's Appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the Eleventh Amendment did not bar the exercise of the Court's equitable powers to award retroactive benefits against the State, and in the alternative, that Illinois had constructively consented to suit by participating in the federal AABD plan. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). The United States Supreme Court granted certiorari on the issue of whether the Eleventh Amendment barred retroactive benefits. Since the 1973 ruling by the Seventh Circuit, the sole issue in this case has revolved around the propriety of retrospective relief.

In reversing the ruling of the Seventh Circuit, the United States Supreme Court in a landmark decision unambiguously held that the Eleventh Amendment constitutes a jurisdictional bar to the exercise of federal judicial power and that:

> ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex Parte Young, supra*, and may not include a retroactive award which requires payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra.*" 415 U.S. at 677.

Despite this ruling by the nation's highest court, Respondent, on remand before the Seventh Circuit,

sought to evade the bar of the Eleventh Amendment by seeking *inter alia* (1) an identical order of equitable restitution based on the Fourteenth Amendment, and (2) an order directing the District Court to enter a declaratory judgment that members of the Plaintiff Class were illegally deprived of AABD assistance and are entitled to restitution. This subterfuge was unavailing and the Court of Appeals reversed the award of retroactive benefits and remanded the cause to the District Court with instructions to modify its judgment in accordance with the decision in *Edelman*.

Respondent, in yet another maneuver to undo the ruling of this Court, successfully petitioned the District Court to require the State to send each member of the Plaintiff Class a written notice entitled "Notice of Right to Appeal Denial of Benefits" to each member of the Plaintiff Class whose application was delayed in processing during the period between 1968 and April 16, 1971, the date of the preliminary injunction. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. The Court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." By its terms the notice of appeal set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled." The District Court's decision is reported as *Jordan v. Trainor*, 405 F.Supp. 802 (N.D.Ill. 1975), see Appendix A.

Petitioner appealed this decision to the United States Court of Appeals for the Seventh Circuit, and a three-

judge panel of that Court unanimously reversed the order of the District Court and held that the Eleventh Amendment constituted a bar to the trial court's order requiring such notice. The panel further found that the order attempted to accomplish by indirection an end prohibited by this Court in *Edelman*. See *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977), Appendix B.

The Court of Appeals granted Respondent's petition for a rehearing *en banc* and in a majority decision, three judges dissenting, held that a retrospective order requiring a non-consenting state to send a notice regarding retroactive benefits to members of the Plaintiff Class is constitutionally permissible under the Eleventh Amendment and does not circumvent the law of the case as established by this Court in *Edelman*.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT.

On February 8, 1977, the United States Court of Appeals for the Third Circuit in *Fanty v. Commonwealth of Pennsylvania*, 551 F.2d 2 (3rd Cir. 1977), petition for writ of certiorari, filed sub nom., *Randle v. Beal*, No. 76-6853, considered the identical issue presented in the instant action, and rejecting the reasoning adopted by the Seventh Circuit in its *en banc* opinion, reached the opposite conclusion based upon this Court's ruling in *Edelman*.

The Third Circuit, citing *Edelman*, correctly states that the notice relief in question must be tested against two lines of inquiry: (1) whether the relief operates against the sovereign itself or only against an officer;

and (2) whether the relief is a form of redress for a "past breach of a legal duty", 551 F.2d 2, 5.

The Chief Judge of the Third Circuit, Collins J. Seitz, in the controlling Opinion found that the District Court's Order violated the teachings of this Court in *Edelman*. The Pennsylvania notice order under review looked to a "past breach of a legal duty" and was not a "necessary consequence of compliance in the future with a substantive federal-question determination." As a result, the order, in effect, was against a non-consenting sovereign state and the District Court was without authority, under the Eleventh Amendment, to issue the same.

In its *en banc* decision the Seventh Circuit openly concedes that the order in this case operates directly against the sovereign State of Illinois, see Appendix, p. 28a, but, without any authority for the proposition, contends that such an order is permissible under the Eleventh Amendment because "the form of notice we envisage would not create a 'liability' against the state." Appendix, p. 29a. Such an argument ignores the fact that by its terms the Eleventh Amendment constitutes a jurisdictional bar "to any suit in law or equity, commenced or prosecuted against one of the United States."

In a leap of faith[1] unsupported and unsupportable by any logic, the Seventh Circuit, discounting the contrary ruling of the Third Circuit, reaches its desired outcome by resorting to definitional legerdemain:

> "It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as

[1] The Seventh Circuit's opinion invokes the admonition of the 82nd Psalm. Petitioner directs this Court to the teachings of Leviticus, 19:15: "Judges must always be just in their sentence, not noticing whether a person is poor or rich, they must always be perfectly fair."

> to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment." Appendix, p. 32a.

Boiled down to its bare bones, the Court is illogically saying that relief which looks to "a past breach of a legal duty" is neither prospective nor retrospective but simultaneously affects both dimensions for Eleventh Amendment purposes.

The result of the erroneous refusal of the Court of Appeals sitting *en banc* to bar any form of retrospective relief against a non-consenting sovereign State has grave implications for the principle of federalism and dual sovereignty which forms the basis for the Eleventh Amendment's prohibition against suing States in federal court. In disregarding the sound decision of the Third Circuit, the Seventh Circuit has created a constitutional conflict which this Court should resolve.

THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE LAW OF THE CASE AS ESTABLISHED BY THIS COURT TO THE NOTICE ISSUE BEFORE IT.

In its order and opinion of October 19, 1977, the Court of Appeals ignored the legal principle that an inferior court is bound to obey the law of the case as established by a higher court. The law of this case is the substantive ruling by the United States Supreme Court in *Edelman*, which is controlling on any and all subsequent stages of the case unless vacated or reversed. The Supreme Court ruled, and the law of this case is, that a federal court lacks jurisdictional power to hear, and Respondent may not litigate, issues arising out of the past conduct of a State and secure a mandatory order regarding and affecting retroactive benefits, without the State's consent.

Respondent's motion in the District Court on remand represents a scandalous and brazen effort to subvert the decision of the United States Supreme Court and to secure by indirection that which is forbidden directly. Judge Pell, in his dissenting opinion, deplored the artful evasion of the law of the case which Respondent has perpetrated. By Judge Pell's analysis there can be no constitutionally inoffensive form of notice regarding retroactive benefits consistent with this Court's decision:

> "Notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which 'is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials'.
>
> This court, in my respectful opinion, should not lend its hand to such subterfuge." Appendix, p. 33a.

That a subterfuge has been engaged in becomes clear upon consideration of this Court's pertinent observation in *Edelman* that as time goes by relief regarding retroactive benefits becomes compensatory rather than remedial because "the coincidence between previously ascertained and existing needs becomes less clear." *Edelman v. Jordan*, 415 U.S. 651, 666, footnote 11.

The sole realistic function of the relief authorized by the Seventh Circuit is to provide the Plaintiff Class with a vehicle for the recovery of money from the Treasury of the State of Illinois in respect to needs which existed six to nine years ago. This Court has absolutely precluded the Plaintiff Class in this case from using a federal forum to secure compensatory relief from the State of Illinois. Since the notice relief at issue here is in essence compensatory and is designed to permit recovery of money from a non-consenting State, the Seventh Circuit decision runs directly afoul of *Edelman*. As this Court previously stated in *Ford Motor Company v. Department of Treasury*, 323 U.S. 459, 464 (1945):

> When the action is *in essence* one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . ." (Emphasis added).

CONCLUSION

For all these reasons, it is respectfully requested that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, et al.,

Plaintiffs,

v.

JAMES TRAINOR, Acting Director, Illinois Department of Public Aid, et. al.,

Defendants.

MEMORANDUM OPINION

This case is now before the Court on remand from the decision of the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), and the order of the Seventh Circuit dated October 29, 1974 to this Court, and pursuant to the motion of the plaintiffs to require notice to members of the plaintiff class.

The only remaining question in this case relates to fashioning the appropriate relief, if any, to deal with defendant's illegal denial of public assistance benefits to the needy aged, blind, and disabled members of the plaintiff class, which consists of all needy aged, blind, and disabled persons who applied for Aid to the Aged, Blind and Disabled (AABD) at one of the offices of the Illinois Department of Public Aid between July 1, 1968 and April 16, 1971, and whose applications were illegally delayed in processing, and who, as a result, were illegally denied benefits to which they were entitled.

Upon finding that the plaintiff class was illegally denied benefits to which its members were entitled, the District Court, Judge Napoli presiding, entered a permanent injunction "to insure compliance, present and future, with the requisite time limitation," (*Jordan v. Swank*, 71 C 70, unpublished opinion, p. 2, February 4, 1972), and also ordered the state officials to release and remit AABD payments wrongfully withheld from those members of plaintiff's class, defined in the trial court's order to include:

> Those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for Aid to the Disabled as of January 1, 1971) limits. *Jordan v. Swank*, p. 3 *supra*.

The holding of the district court was affirmed by the Seventh Circuit in *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973); in an opinion in which the Court upheld the relief granted by the trial court and agreed that the "defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal rights, and held that the District Court properly ordered equitable restitution of the benefits wrongfully denied. *Weaver, supra*, at 994. Moreover, the Seventh Circuit held that the Eleventh Amendment to the Constitution did not deprive the federal court of jurisdiction to order the defendants to pay assistance benefits illegally denied members of the plaintiff class.

In *Edelman v. Jordan, supra*, the United States Supreme Court reversed that portion of the Seventh Circuit's opinion which affirmed the District Court's order that retroactive benefits be paid by Illinois State officials. The Court held that, under *Ex Parte Young*, 209

U.S. 123 (1908), the prospective portion of the District Court's order which enjoined state public aid from failing to process applications within federal time limits, did not contravene the guidelines of the 11th Amendment. On the other hand, *Ex Parte Young* did not, it continued, authorize ordering recovery from state funds of an accrued monetary liability. The test established by the Court in *Edelman*, for determining which claims against the unconsenting state are barred by the 11th Amendment and which are permitted, is whether the award is by its terms prospective in nature, even though its implementation may have fiscal consequences. This characterization avoided the labeling of relief as equitable or monetary, which the Court found to be of little analytical benefit, and focused on the substance of the relief awarded. An ancillary fiscal impact in conjunction with the state's compliance in the future with a court order was held to be permissible under the 11th Amendment. The Court also rejected the Seventh Circuit's theory that the State of Illinois had consented to suit for retroactive relief by participating in the federal AABD program, holding that such consent will be found to exist only where set out in explicit statutory language or overwhelming textual implication.

The question here is whether the relief requested by plaintiff is prospective in nature, notwithstanding the fiscal consequences of its award, or a retroactive award of monetary relief falling within the proscription of *Edelman v. Jordan, supra*.

The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards. Rather, it involves only the sending of notices to members of the plaintiff class explaining their

possible entitlement to retroactive benefits and the appropriate state administrative and appeals procedures to be followed in applying for those benefits. The requested relief, therefore, while related to possible retroactive benefits, is clearly not an award of those benefits. The plaintiffs contend that *Edelman* does not deprive this court of jurisdiction to grant the requested relief and cite authority in support thereof. The defendants argue that *Edelman* erects an absolute bar, based on the 11th Amendment, to any order related in any possible way to payment of retroactive benefits by the state, that no existing authority supports the Court's ordering the state to send notices, and that plaintiffs are estopped by their pleadings to seek state administrative remedies.

The following language from the Supreme Court's opinion in *Edelman* indicates its concern with the award by a federal court of direct retroactive monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law, even when a monetary loss would occur therefrom:

> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in Ex parte Young hewed to no such line.
>
> * * * * *
>
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those

> whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State . . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

The instant case involves the awarding of non-monetary relief but related to the possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class. This relief falls outside the area proscribed by the Supreme Court's *Edelman* opinion.

The Eleventh Amendment seeks to avoid the clash of federal and state sovereigns. In this respect, a distinction exists between compensating individuals directly and notice that relief may be available. Even if the latter ultimately results in a direct award of benefits, federal interference in such an award would be minimal. The Eleventh Amendment by its terms denies jurisdiction to federal courts only of suits against one state by citizens of another or by citizens or subjects of a foreign state. While this has been read to preclude federal courts from ordering payments by states of state funds, it has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state, e.g., writs of habeas corpus, injunction, mandamus, etc. Nor, do we believe, may it be used by a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid

claims against it. Accordingly, we conclude that ordering the sending of notices is not barred by the 11th Amendment to the Constitution.

Among the courts addressing the precise issue before us, none has denied the motion to require the sending of such notices. In *Grubb v. Sterrett*, 315 F.Supp. 990 (N.D. Ind. 1970), a pre-*Edelman* case, the court held a statewide welfare regulation to be contrary to the Social Security Act and, therefore, invalid under the Supremacy Clause. Because the state had provisions for hearings regarding corrective retroactive payments, the court did not grant the retroactive monetary relief; rather, it remanded the claim for back benefits to the Indiana Department of Public Welfare and required the state to send notices to members of the plaintiff class. This course obviated the Court's consideration of any 11th Amendment objection to its jurisdiction to award retroactive monetary benefits.

In *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), also pre-*Edelman*, the Eighth Circuit vacated a District Court decree requiring the Iowa Department of Public Aid to make retroactive payments on the ground that it was unnecessary to decide the 11th Amendment question, since the Iowa Department of Public Aid regulations specifically required the payment, following state administrative hearings, of benefits illegally withheld. It also upheld that portion of the District Court's order which held a section of the Iowa Code violated the Social Security Act and required the state to send a notice of eligibility to those previously denied benefits.

In *Morris v. Houston*, 0-250-73 C.A. (W.D.Mich. Oct. 18, 1974), the Court held that a Michigan Public Aid Department's regulation excluding the unborn child

from the definition of a "dependent child" was contrary to the Social Security Act.* The Court recognized that *Edelman* precluded the retroactive payment of benefits, but, regarding the question of whether the Amendment barred the remanding of plaintiffs to state fair hearing procedures in order to recover benefits illegally denied, Chief Judge Fox held:

> The Court need not enter an order remanding the plaintiffs to state administrative procedures, because these procedures are available to them without such an order. . . . The Eleventh Amendment operates as a jurisdictional bar on this Court in limited circumstances, but the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits. The Court cannot presume that the state will violate its own regulations but should it do so, the aggrieved parties will certainly have an action in state or federal court. The members of the plaintiffs' second subclass [needy pregnant women and their unborn children who applied for AFDC benefits in Michigan after the date of the injunction] cannot utilize the state procedures unless they are notified of their existence. Therefore the injunction to be issued will enjoin the defendants to inform the members of the plaintiffs' second subclass that they may apply for retroactive benefits through the state hearing procedure, and shall also give the members of the subclass precise information as to the means of application. In these and other particulars, the notice should follow the form and content required by state and federal regulations for similar notifications, due allowance being made for the special circumstances of this case. *Houston* at 15-16.

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* The Sixth Circuit by order reversed *Morris v. Houston* on the legality of the "unborn child" exclusion, based on the Supreme Court's opinion in *Alcala v. Burns*, 43 USLW 4374 (March 18, 1975).

The foregoing cases clearly demonstrate that the 11th Amendment is no bar to the requested relief.

The cases cited by defendants in support of their position do not address the issue of notice. *Alcala v. Burns*, 494 F.2d 743 (8th Cir. 1974), held that the 11th Amendment prohibited an award of retroactive payments. That Court, which also decided *Doe v. Gillman, supra*, based its holding on an earlier decision in which it directly resolved the question of whether the 11th Amendment bars retroactive relief. *Taylor v. Lavine*, 497 F.2d 1208, 1213 (2nd Cir. 1974) is inapposite, even though the Second Circuit considered plaintiff's appeal from the District Court's denial of retroactive payments, inasmuch as the Second Circuit reversed the District Court's finding that the New York regulations were invalid under the Social Security Act. In *Taylor v. Hill*, 377 F.Supp. 495 (W.D. N.C. 1974) the District Court granted a preliminary injunction on the grounds, *inter alia*, that plaintiff would suffer irreparable harm resulting from the court's inability to award retroactive payments, where welfare benefits have been unlawfully withheld. *Barron v. Bellows*, 496 F.2d 1198 (5th Cir. 1974), simply denied retroactive injunctive relief and financial assistance to members of the plaintiff class. Similarly, *Owens v. Roberts*, 377 F.Supp. 45 (M.D. Fla. 1974), in light of *Edelman*, granted defendant's motion to amend a judgment which had awarded retroactive benefits to members of the affected class. A more relevant consideration in *Owens* was the Court's determination of whether the state should be required "to identify the members of the affected class" for the purpose of "grandfathering" them into the Federal Supplemental Security Income Program, which assumed responsibility as of January 1, 1974 for the state AABD program. The Court concluded that such a burden should not be placed

on the state because of, *inter alia*, the inordinate expense and extant alternative means of identification. It is noteworthy that the Court apparently assumed that the 11th Amendment would not bar such an order.

Defendants contend in a supplemental brief that the Seventh Circuit's denial of plaintiffs' request for declaratory judgment on remand and defendants' assertions before the Seventh Circuit, in opposition to plaintiffs' request, which argued that the 11th Amendment barred any type of relief pertaining to retroactive benefits, settled the question of whether the relief presently requested by plaintiffs is barred by the 11th Amendment. We disagree. The Seventh Circuit Order, pursuant to *Edelman*, only reversed the District Court's award of retroactive benefits and ordered the modification of the District Court judgment with respect to the retroactive entitlement of Illinois applicants for aged and blind benefits under 45 C.F.R. § 206.10. Even if the Court of Appeals had held that the *Edelman* decision bars the granting of declaratory relief regarding retroactive benefits, such a holding would not necessarily bar the relief now requested by plaintiffs.

Defendant's final contention is that plaintiffs are estopped by their pleadings to request that notices pertaining to the existence of state administrative remedies be sent out. It cites *Sinclair Refining Company v. Thompkins*, 117 F.2d 596 (5th Cir. 1941); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Hall v. U.S.*, 314 F.Supp. 1135 (N.D. Cal. 1970), in support of this contention.

The cases cited by defendant stand for the proposition that allegations of fact pleaded by a plaintiff are binding. In *Thompkins*, plaintiff's allegation that a small blaze existed when she threw kerosene on the fire,

which led to an explosion, was conclusive of her contributory negligence. In *Hopper*, plaintiff's allegation that his termination was not a breach of contract was conclusive as to the non-existence of the contract. In *Hall*, plaintiff's allegations relating to when he learned that his wife was sterile and that it allegedly resulted from negligent treatment by a military doctor was binding in determining whether his action was time barred.

In the instant case, plaintiffs' allegations that "[n]o adequate administrative remedy or remedy at law is available to the plaintiffs" are not factual assertions which would be binding on plaintiffs. Rather they are legal judgments. As such, they are subject to judicial scrutiny and do not fall into the category of allegations relating to objective phenomena or facts existing irrespective of an observer's interpretation. Even if the instant allegations were not distinguishable from those present in the authorities cited by defendant and even if we found that those allegations were binding upon the instant request, that finding would not have the effect of precluding the sending of notices, inasmuch as it is not inconsistent for plaintiff to maintain that "adequate" remedies are not available and simultaneously request that notices be sent regarding the existence of available albeit less than adequate remedies. In each of the cases cited by defendants the plaintiff's later position was inconsistent with the binding pleadings.

For the foregoing reasons, plaintiffs' motion to require the State of Illinois to send plaintiff class members notices regarding the existence of possible state administrative remedies is granted. In this connection, defendants have requested a stay of the effective date of our order pending appeal to the Seventh Circuit and ultimately, perhaps, to the United States Supreme Court.

While it is logical that no notices should be sent until the validity of our order has been finally determined, we see no reason why the state should not currently compile the names and addresses of all members of the plaintiff class who would be entitled to such notice. There has been serious question raised as to whether the state has compiled and is maintaining the necessary records from which such a list could be prepared. The claims here relate to the period July 1, 1968—April 16, 1971. In order to protect against any possible loss or destruction of the necessary records and to insure that notices can be sent out immediately in the event our order is approved, the state is ordered to prepare the list of names and addresses of the persons to whom such notice would be sent but sending of the notices is stayed pending appeal. An appropriate order will enter.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT JUDGE

Dated: August 22, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 71 C 70

JOHN JORDAN, et al.,

Plaintiffs,

v.

JAMES TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants.

FINAL JUDGMENT AND INJUNCTION

This cause coming on to be heard pursuant to the order and mandate of the Seventh Circuit, and the motions of the parties, and the memorandum opinion of the Court issued July ....., 1975,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The plaintiffs' motion to require notice to members of the plaintiff class is granted.

2. The defendants' motion to deny plaintiffs' request for notice to members of the plaintiff class is hereby denied.

3. Paragraph 5 of the judgment in this cause entered on March 15, 1972, granting retroactive benefits to members of the plaintiff class is hereby vacated, and the following paragraphs are substituted in place thereof as paragraph 5.

> The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, attorneys and those in active concert and participation with them, are hereby enjoined, to notify each member of the plaintiff class (as defined

below) that he has been denied assistance benefits, with the amount specified in each individual case, and that he may attempt to recover those benefits by signing a notice of appeal (which is to be enclosed therein, together with a return envelope) contesting the denial of those benefits, and returning it in the enclosed envelope. The defendants shall send to each member of the plaintiff class, except those persons who previously were mailed written notice of the denial of said benefits, the notice attached hereto as Exhibit A. The notice of appeal to be sent to members of the plaintiff class is attached hereto as Exhibit B.

The members of the plaintiff class are defined as all applicants for Aid to the Aged, Blind, and Disabled (hereinafter "AABD") in the State of Illinois who applied between July 1, 1968, and April 16, 1971, and were determined eligible for AABD, as follows:

(a)
Aged and blind applicants whose first full AABD check was not mailed within thirty (30) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the thirtieth (30th) day from the date of application to the date the applicant's entitlement to AABD became effective.

(b)

(i) Disabled applicants who applied between July 1, 1968, and December 31, 1970, whose first full AABD check was not mailed within forty-five (45) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the forty-fifth (45th) day from the date of application to the date the applicant's entitlement became effective.

(ii) Disabled applicants who applied between January 1, 1971, and April 16, 1971, whose first

full AABD check was not mailed within sixty (60) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the sixtieth (60th) day from the date of application to the date the applicant's entitlement became effective.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys shall submit to the Court within sixty (60) days of this judgment the names and addresses of all members of the plaintiff class, and the amount of benefits denied in each individual case. The sending of the notices to each individual member of the plaintiff class, as required above, however, shall be stayed pending appeal, if any, of this cause.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys, shall issue timely instructions to caseworkers, hearing officers, and other appropriate personnel consistent with, and in furtherance of, this final judgment and injunction.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT COURT JUDGE

Date: August 22, 1975

EXHIBIT "A"

Date:

Illinois Department of Public Aid

NOTICE OF RIGHT TO APPEAL DENIAL OF BENEFITS

When you applied for Aid to the Aged, Blind, and Disabled in the period between 1968 and 1971, your application was delayed in processing. As a result of the delay, you were denied public assistance to which you were entitled in the amount of $ ..... . As a result of a federal court order, the Illinois Department of Public Aid is required to notify you of this denial of benefits, and is also required to inform you that you may file a notice of appeal challenging the denial of benefits. Enclosed herewith is a Notice of Appeal which you should complete and mail to the Illinois Department of Public Aid in the enclosed postage paid envelope, if you wish to appeal the denial of your benefits. This notice of appeal must be mailed within sixty (60) days from the date of this notice.

If you have any questions in connection with this matter, you may call the attorneys in the federal lawsuit who have been representing the class of aged, blind, and disabled persons who were illegally denied benefits. (Legal Assistance Foundation of Chicago, [312] 939-5940. Call Collect.)

EXHIBIT "B"

Illinois Department of Public Aid

NOTICE OF APPEAL

I, _____ of _____
Appellant's Name Street or RFD

_____, Illinois _____
City County Telephone Number

hereby appeal to the Illinois Department of Public Aid for a fair hearing because of the

(X) action
or (check one)
( ) inaction

of the _____ County Department of Public Aid.

My reason for requesting a fair hearing is: (Please be as clear and specific as you can in stating the county department action (or inaction) from which you are appealing.)

The department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled.

Your Case Number _____

Type of Program _____

_____
Appellant's Signature

Please notify:

Legal Assistance Foundation of Chicago
Re: JORDAN Case
64 East Jackson Boulevard
Chicago, Illinois 60604

_____
Date

My race is: [ ] White; [ ] Negro; or [ ] Other

FOR AGENCY OFFICE USE:
TO BE COMPLETED BY THE COUNTY DEPT.

Date this Notice of Appeal received _____

Date of written or oral request for this hearing, if preceding this form _____

Date of Decision appealed from _____

Case Name _____ Case Number _____

NOTE: The county department will assist you in preparing the above form. Upon completion, file the notice with the county department, or with the Illinois Department of Public Aid, Hearing Officer, 209 West Jackson Blvd., Room 801, Chicago, Illinois 60606. You are entitled by law to a final decision on your appeal within 90 days from the time you requested the appeal, unless you have requested a delay of your hearing.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 71 C 70—**Hubert L. Will**, *Judge.*

ARGUED DECEMBER 2, 1975—DECIDED MARCH 10, 1977

Before PELL and BAUER, *Circuit Judges*, and WHELAN, *District Judge.**

WHELAN, *District Judge.* This action has, prior to this appeal, been upon appeal to this court and thereafter was before the United States Supreme Court after a grant of certiorari. Involved in the earlier appeal was the validity of a judgment of the United States District

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

Court whereby the Defendants-Appellants (officials of Illinois Department of Public Aid) were ordered to process Aid to the Aged, Blind, or Disabled Program applications in the State of Illinois in conformity with federal regulations. Defendants-Appellants were also ordered to release and remit payments under such Program which had been wrongfully withheld from applicants, who were members of the original plaintiff class as framed in the complaint.

On the first appeal the Defendants-Appellants contended that the Eleventh Amendment to the United States Constitution barred the exercise of the court's equitable powers to award such retroactive benefits against the state. On such first appeal, this court affirmed the judgment of the District Court, holding that the Eleventh Amendment did not bar the exercise of the court's equitable power to award such retroactive benefits against the state. The court also held, in the alternative, that the State of Illinois has constructively consented to suit by participating in the Federal Aid to the Aged, Blind, or Disabled Program.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the United States Supreme Court stayed the granting of the retroactive relief pending appeal and thereafter reversed the decision of this court which had allowed such retroactive relief. The Supreme Court at page 677 of its opinion stated: "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires payment of funds from the state treasury . . . ." This court thereafter remanded the case to the District Court; such order of remand stated in pertinent part: "Pursuant to the mandate of the Supreme Court it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application."

On remand, the District Court heard a motion of Plaintiff-Appellee to require notice to members of the plaintiff class. The District Court Judge granted such motion and ordered that the officials of the Illinois Department of Public Aid send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application was delayed in processing during the period between 1968 and 1971. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. It appears from the briefs of both parties that such notice was ordered sent to approximately 20,500 persons. Also, the notice advised the particular person notified that such person "may file a notice of appeal challenging the denial of benefits." The court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." Such notice of appeal by its terms set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled."

On this appeal Defendants-Appellants contend that the order of the United States District Court requiring such notice, together with a form of notice of appeal, to be mailed to each member of the plaintiff class, is barred by the Eleventh Amendment. We hold that the Eleventh Amendment constitutes a bar to the trial court's order requiring such notice.

The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was "denied public assistance to which you were entitled" in an amount to be stated in such notice. Unquestionably the person receiving such notice would thereupon file the notice of appeal which was forwarded to him or her. In view of the admission of liability by the state, the course of such appeal would

automatically result in payment of state funds. The payment would occur as the result of the judgment of the District Court here appealed from.

The District Court stayed that part of the order directing the mailing of the notice and form of notice of appeal pending appeal of this case; however, that portion of the order requiring the Illinois Department of Public Aid to compile a list of all of the persons entitled by the terms of the order to such notice was not stayed pending appeal.

The Supreme Court in *Edelman* at pages 677-678, makes it very clear that the Eleventh Amendment is in substance a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case.

Fitzpatrick v. Bitzer, ... U.S. ....., 44 U.S. L.W. 5120 (June 28, 1976), does not support the position of Plaintiffs-Appellees. It is true that the Supreme Court there reversed the decision of the Court of Appeals which had barred monetary relief to the appellants therein. However, the relief sought against the State of Connecticut in *Fitzpatrick* was for, *inter alia*, damages for past acts of Connecticut state officials in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court made it clear that it was granting the right of employees to sue the state for violation of Title VII because of the power given to Congress by Section 5 of the Fourteenth Amendment to enforce the substantive provisions of the Fourteenth Amendment. Section 5 specifically provides that the Congress shall have power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. Thus, Congress had the power in passing Title VII to include states as parties-defendant in order to enforce the rights of persons to have equal protection of the laws. It also had the power to require a state to satisfy its duties with respect to its treatment of private individuals.

Fitzpatrick further indicates that Plaintiffs-Appellees in the instant case are not entitled to the relief given by the District Court. In *Fitzpatrick* the Supreme Court restated the *Edelman* doctrine when, in referring to *Edelman*, it stated: "We concluded that none of the statutes relied upon in *Edelman* contained any authorization by Congress to join a state as a defendant. . . . The provisions of the Social Security Act relied upon by plaintiffs [in *Edelman*] were held by their terms not to 'authorize suit against any one.'" *Fitzpatrick v. Pitzer, supra*, 44 U.S.L.W. at 5122. Nor do any of the other authorities cited by Plaintiffs-Appellees support their position.

It should further be noted that the terms of the judgment of the District Court here on appeal fixed various times during which the various members of the plaintiff class could appeal the denial of A.A.B.D. assistance.

When the action is, in essence, one for the recovery of money from the state, and the action is not brought under a statute enforcing a right against a state under the Fourteenth Amendment, the state is entitled to invoke its sovereign immunity from suit. *See Ford Motor Company v. Department of Treasury*, 323 U.S. 459 at 464 (1945).

Subsequent to oral argument in this case, pursuant to former Circuit Rule 29 (now Rule 11), the appellees cited the case of *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *stay granted*, 426 U.S. 902, as supporting their principal position. We find the support lacking. It is true that that abbreviated opinion does approve a district court order requiring a state welfare division to notify members of the appellee's class who were denied medical assistance in violation of the district court's order. The state authorities in *Lewis* challenged the order on the basis that it would require the expenditure of public funds in the process of notification, thereby violating the Eleventh Amendment. The court held that this processing expense was permissible in that it had only an ancillary effect under *Edelman*. The court pointed out in *Lewis*, at 795, that the district court order

did not require the state to make any retroactive medical payments. That the processing expenditures were all that was involved is clear from the district court opinion referring to the fact that the complaint sought an injunction "from *further* denying medical assistance." [Emphasis added.] *Lewis v. Shulimson*, 400 F. Supp. 807, 808 (E.D. Mo. 1975).

Appellees' reliance upon *Lewis* is misplaced. In the present case the state authorities are contending that the district court order while not directly ordering retroactive payments is for all practical purposes doing so. We agree. Further, we note various district court cases cited to us regarding the matter of giving and processing notification of benefits to welfare recipients, some of these cases being pre-*Edelman*. We find no persuasive authority in these cases contrary to the position we reach in the present case.

The language of *Edelman* directed to the prior order in this litigation appears to us to be directly applicable to the district court order now under review:

> [I]t is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668. In sum, we decline to countenance the accomplishment of a prohibited end by indirection. The action of the district court in fact did not comply with our earlier remand. That remand ordered, in substance, that the district court judgment be modified to insure that entitlement need not attach to Plaintiffs-Appellees for retroactive benefits and the judgment was not so modified but instead was recouched in a form designed "in practical effect" to achieve the original goal.

For the foregoing reasons, the judgment of the district court dated August 22, 1975, is reversed and the cause is remanded to the district court for further proceedings consistent herewith.

REVERSED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 70—Honorable **Hubert L. Will**, *District Judge.*

ARGUED JUNE 8, 1977—DECIDED OCTOBER 19, 1977

Before FAIRCHILD, *Chief Judge*, and SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* In 1971 plaintiffs filed this class action seeking declaratory and injunctive relief alleging failure of the Illinois Department of Public Aid to process applications for assistance under the Aid to the Aged, Blind and Disabled program (AABD) within the time limits prescribed by federal regulations. Plaintiffs sought to have entitlement attach at the end of the federal time limit. The distirct court in an unreported decision required by permanent injunction that defen-

dants comply in the future with the time limits and awarded retroactive benefits. Upon appeal that judgment was affirmed. *Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). The Supreme Court granted certiorari, and in a five to four decision reversed upon Eleventh Amendment grounds so much of the decree which ordered retroactive payment of benefits found to have been wrongfully withheld but left undisturbed the purely prospective relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). Thereafter this court remanded the case to the district court. After remand, plaintiffs filed a motion for an "order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal." Over the defendant's Eleventh Amendment objections the motion was allowed. *Jordan v. Trainor*, 405 F.Supp. 802 (N.D. Ill. 1975). The trial court's order set forth the form of the Notice of Right to Appeal Denial of Benefits to be used by the Department and the Notice of Appeal to be used by the applicant. On appeal of that order a panel of this court reversed holding that the Supreme Court in *Edelman* had interpreted the Eleventh Amendment to be a jurisdictional bar precluding any type of retroactive relief. *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977). A Petition for Rehearing in Banc was granted.[1]

The issue being reconsidered is whether or not the Eleventh Amendment bars the proposed limited use of the court's equitable power in these circumstances. Defendants do not urge upon us the view that there is no "case or controversy" as required by Article III, Section 2 of the Constitution. That problem was referred to by

[1] United States District Judge Francis C. Whelan of the Central District of California was a member of the three-judge panel which decided *Jordan*. Judge Whelan did not, however, participate in this court's vote on plaintiffs' suggestion for rehearing in banc. See FED. R. APP. P. 35.

Judge Garth in his concurring opinion in *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1976). In the present case the trial court determined that the class included applicants who had applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations. In its judgment, in addition to its award to applicants of past benefits withheld, the trial court held certain applicable state regulations to be invalid and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.

The specified notice required by the district court to be sent to members of the class stated in part that "you were denied public assistance to which you were entitled in the amount of $..... ." Enclosed with that notice was the other form, "Notice of Appeal," to be signed by the applicant and returned to the Illinois Department of Public Aid. That notice contained the language "The department illegally delayed in the processing of my AABD application, and, as a consequence denied me benefits to which I was and am entitled." We agree with the panel's opinion that

> "The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was 'denied public assistance to which you were entitled' in an amount to be stated in such notice."

That admission was compelled by the order of the district court and appears to be a type of money judgment against the state. We agree that the district court's order controverts the Eleventh Amendment in this regard and cannot be sanctioned.

The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his Memorandum Opinion to which they were attached. With those views, but not the forms, we agree.

The more delicate variation of that issue is the constitutionality of a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided. Those notices would not be handicapped by any federal predetermination of state liability. The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state.

This court is not in agreement on the constitutionality of such limited relief as an adjunct to the purely prospective relief granted. Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment. There is no longer a claim that the state has waived its constitutional protection under the Eleventh Amendment. It is likewise conceded that the state, not merely an officer, would be directly involved in any relief granted. We realize there is little or no supporting precedent directly in point to give us complete confidence in our view, but we shall examine what we find.

We look for guidance to *Edelman v. Jordan, supra.* As the Court pointed out, the rule "has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred. . . ." 415 U.S. at 663. "*Ex parte Young* [209 U.S. 123 (1908),] does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenue of a State. . . ." *Id.* at 664. The Court also noted that the retroactive portion of the district court's order required "the payment of a very substantial amount of money." *Id.* We learn also that the character of any relief ordered which may in practice resemble a money judg-

ment payable out of the state treasury cannot be changed or made acceptable by labeling it "equitable" in nature. *Id.* at 666. What had been labeled "equitable restitution" was found to be indistinguishable in many aspects from an award of damages against the state. *Id.* at 668.

The form of notice we envisage would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. The defendant makes no issue out of any incidental administrative expense connected with the preparation or mailing of the notice. It has suggested in the record that the notice could be included in the regular monthly mailing. The necessary information comes from a computer. There is no indication that the administrative expense would be substantial.

Looking further at *Edelman*, we see some suggestion that the Eleventh Amendment, even apart from *Ex parte Young*, may not be a total and complete bar so long as it does not constitute a retroactive award for damages to be paid by state funds. The Court commented that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case. . . ." 415 U.S. at 665. Similarly, the Court recognizes that "[a]s in most areas of the law, the difference between the type barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day." *Edelman* specifically overruled three recent cases in which the Supreme Court had summarily affirmed district court judgments requiring state directors of public aid to make similar retroactive payments as were originally ordered in this case by the district court. Although the list may not be intended to be complete, there is no mention of the three-judge decision, *Grubb v. Sterrett*, 315 F.Supp. 990 (N.D. Ind. 197

summarily affirmed 400 U.S. 922 (1971).[2] That decision provided for notice to members of the class whose applications for Indiana public assistance had previously been denied under a regulation subsequently held to be invalid. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations. The cases specifically overruled by the Court, on the other hand, provided for actual retroactive payments. Thus we deem the omission of *Grubb* from the cases specifically overruled to be of some significance. As we read *Edelman*, we believe that the case allows limited flexibility and does not foreclose the modified relief we approve.

Plaintiff cites *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), *cert. denied*, 421 U.S. 920 (1975), as post-*Edelman* authority which left in effect, after a partial reversal, a requirement that the Iowa Department of Social Services send notice of eligibility to applicants previously denied benefits. The court of appeals found it unnecessary to resolve the Eleventh Amendment issue of retroactive payments since the court assumed that Iowa would follow its own regulations and that any retroactive payments owing would be made. The record in this case does not suggest that we indulge in a similar assumption to avoid a constitutional issue. Defendant dismisses *Gillman* both as a pre-*Edelman* case and because it avoids the Eleventh Amendment issue. Although the case was decided by the Eighth Circuit prior to *Edelman*, certiorari was denied by the Supreme Court after *Edelman*.

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[2] Footnote 13 of *Edelman* lists only the following cases:

1) *State Dept. of Health and Rehabilitative Services v. Zarat*, 407 U.S. 918 (1972), aff'g 347 F.Supp. 1004 (S.D. Fla. 1971); 2) *Sterrett v. Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972), aff'g unreported order and judgment of District Court (N.D. Ind. 1972) on remand from *Carpenter v. Sterrett*, 405 U.S. 971 (1972); 3) *Gaddis v. Wyman*, 304 F.Supp. 717 (SDNY 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968-1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman v. Bowens*, 397 U.S. 49 (1970).

The plaintiff also cites *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3634. In that case notice was required to be given by the state to those in the class who had previously been denied medical assistance in violation of the court order. However, no retroactive payments were involved. The decree was prospective in nature. *Lewis* is only slightly related to the present problem.

The defendant has called to our attention the recent case of *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In that case the state had for a prior period of time attempted to collect from recipients certain previously paid social security benefits as reimbursement to the state. The plaintiff class alleged that this had been accomplished in an illegal manner. The practice of the state had been terminated prior to suit, but some applicants were still making reimbursement payments to the state under agreements entered into during the prior period. The district court did not attempt the restitution to applicants of benefits wrongfully collected by the state and denied declaratory and injunctive relief since current state practices were not in violation. The district court did, however, require the state to serve notice on two sub-classes. Those welfare recipients who were currently reimbursing the state under the prior agreements were to be notified that they were under no legal obligation to continue making reimbursements out of their federal disability benefits. Those welfare recipients who had been previously coerced and misled into making reimbursements in violation of the regulations were to be notified that as a matter of state law they might have a cause of action against the state. Each member of the appellate panel voted to reverse, but for varying reasons. Chief Judge Seitz was of the opinion that *Edelman* controlled since he viewed the district court's order as being "based on a past breach of legal duty" and granting relief not a "necessary consequence of compliance in the future with a substantive federal question determination." Judge Garth believed the Eleventh Amendment issue to be "borderline," but reversed on the basis that there was no case or controversy. Judge

Hunter dissented, and rather than require dismissal of the complaints voted to reverse and remand on the grounds that the requirements for summary judgment had not been met. He disagreed that *Edelman* required dismissal and would draw "no line so sharp" between the past and present aspects of that case. He further disagreed with Judge Garth by finding there to be a justiciable case. There are some factual distinctions between that case and the present case, but they are not so significant as to avoid conflict in principle with our present decision on the Eleventh Amendment issue. Since Judge Garth considered the Eleventh Amendment issue a borderline question and Judge Hunter was of the view that the Eleventh Amendment did not bar the notice relief, although he also recognized some problems with the form of the proposed notice, we do not view that case as strong authority to the contrary.

If our task was only to enforce the federal regulations, use our equitable powers and heed the admonition of the 82nd Psalm to "Do justice to the afflicted and needy," our decision would not be so difficult. It appears that the needed list of applicants and information is already available from the state computers and that the administrative cost to the state of the contemplated modified notice procedure would not be significant. No judgment for any award of damages against the state comes from the federal court. The members of the class will be given no more by the proposed modified notice than what they would have gathered by sitting in the courtroom, or by reading and listening to news accounts had the case attracted any attention. As for the state, our decision means only that if an appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant. It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment. We reverse and remand for additional proceedings not inconsistent with this opinion.

PELL, *Circuit Judge*, dissenting.

Being of the opinion that the constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed, I respectfully dissent. The fact that the result may appear desirable from a societal point of view should play no part in the decision.

The case before the panel of this court, reported at 551 F.2d 152, involved, in my opinion, such an effort at indirection. The *en banc* majority opinion agrees that the panel properly struck down as violative of the Eleventh Amendment the order of the district court. The validity of that order was all that was presented to the panel for decision. The *en banc* majority opinion then proceeds to attempt to prescribe a constitutionally inoffensive form which the state authorities would be required to send to those persons precluded by the Supreme Court decision from collecting by direct judgment the very amounts which would be involved in the notices to be sent.

The Supreme Court in reversing the first order of the district court as affirmed by this court did so on the basis that the order would result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," 415 U.S. at 668.

Now, notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

This court, in my respectful opinion, should not lend its hand to such subterfuge.

TONE, *Circuit Judge*, dissenting. Judge Wood's opinion for the court presents an appealing solution to the Eleventh Amendment problem. In my view, however, the Supreme Court's decision that a federal court may not retroactively enforce the plaintiffs' rights against the state, *Edelman v. Jordan*, 415 U.S. 651, 658, *et seq.* (1974), precludes us from entering an order aimed solely at retroactive enforcement, albeit in another form.

BAUER, *Circuit Judge*, dissenting. I join in the dissents of Judges Pell and Tone.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court, U.S.
FILED
MAY 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 12, 1977
CERTIORARI GRANTED FEBRUARY 27, 1978

Keenan Printing Company 312-648-0050 365

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

VS.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1-12-71	Filed Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief.
1-14-71	Filed Motion for Temporary Restraining Order and Affidavit of Jeanette Bryant.
1-21-71	Enter order dated January 21, 1971: Enter Temporary Restraining Order and extension of said order until April 15, 1971, nunc pro tunc as of January 15, 1971. (DRAFT)—Napoli, J.
1-28-71	Filed Amended Complaint for Declaratory Judgment, Equitable and Other Appropriate Relief.
3-22-71	Filed Answer of Defendant Swank to Plaintiff's Amended Complaint.
4- 5-71	Filed Motion to Strike Certain Portions of Defendant's Answer.
4-15-71	Filed Plaintiff's Motion for Preliminary Injunction, and Brief in Support.
4-15-71	Enter order dated April 15, 1971: Enter order that Paragraphs 30 and 31 of Plaintiff's Amended Complaint are deemed admitted.—Napoli, J.
4-16-71	Enter order dated April 16, 1971: Enter Preliminary Injunction. (DRAFT)—Napoli, J.
7-27-71	Filed Motion for Order that Facts be taken as Established.
7-27-71	Enter order dated July 27, 1971: Enter order that Plaintiff's Motion for order that Facts be taken as Established is granted. Request for costs and attorneys fees is denied.—Napoli, J.

DATE	PROCEEDINGS
10-21-71	Filed Plaintiff's Motion for Summary Judgment, Permanent Injunction, and Other Relief.
11-10-71	Filed Plaintiffs' Brief in Support of Motion for Summary Judgment, Permanent Injunction, and Other Relief.
12- 1-71	Filed Defendant's Brief in Opposition to Motion of Plaintiffs for Summary Judgment, Permanent Injunction, and Other Relief.
12-10-71	Filed Plaintiffs' Reply Brief.
2- 4-72	Enter order dated February 4, 1972: Pursuant to Memorandum Opinion and Order, enter order granting summary judgment in favor of the plaintiff class and against defendant. Plaintiff is ordered to present within 20 days a proposed judgment order and decree. (DRAFT)—Napoli, J.
3-15-72	Entry of Judgment dated March 15, 1972. (DRAFT)—Napoli, J.
3-24-72	Filed Defendant's Notice of Appeal.
3-28-72	Filed Brief in Opposition to Retroactive Payments.
3-28-72	Filed Motion to Vacate Pursuant to Rule 60 of the Federal Rules of Civil Procedure.
3-28-72	Filed Motion for Stay Order.
3-28-72	Enter order dated March 28, 1972: Enter order that Defendant's motion to vacate pursuant to Rule 60 F.R.C.P. is denied.—Napoli, J.
4- 7-72	Filed Plaintiffs' Notice of Cross Appeal.

DATE	PROCEEDINGS
4- 7-72	Filed Plaintiffs' Brief in Support of Relief Granting AABD Benefits Wrongfully Withheld and in Opposition to Defendant Weaver's Motion for a Stay of the Entire Judgment.
5- 2-72	Enter order dated May 2, 1972: Enter order staying the effect of paragraph 5 of the judgment order entered March 15, 1972, relating to retroactive benefits, during Defendant Weaver's appeal. In other respects, defendant's motion for a stay is denied. (DRAFT)—Napoli, J.
2-15-73	Filed mandate and opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the district court and dissolving the stay with respect to paragraph 5 of the judgment.
7-24-73	Filed letter from the Supreme Court of the United States, with a certified copy of the order granting a stay of paragraphs 5 and 6 of the judgment.
11-25-74	Filed certified copy of order from the United States Court of Appeals for the Seventh Circuit dated October 29, 1974: Pursuant to mandate of the Supreme Court, it is ordered that the District Court's award of retroactive benefit payments to plaintiffs is reversed and cause is remanded to the court below with instructions to modify its judgment.
11-26-74	Filed Plaintiffs' Motion to Require Notice to Members of the Plaintiff Class, and memorandum in support.
12-10-74	Filed Defendant's Brief on Remand in Opposition to Plaintiff's Motion for Notice to the Class.

DATE	PROCEEDINGS
12-12-74	Filed Plaintiffs' Reply Memorandum in Support of Motion to Require Notice to Members of the Plaintiff Class.
1- 9-75	Filed Defendant's Motion to Deny Plaintiff's Request for Notice to Members of the Plaintiff Class and Brief in Support.
1-16-75	Filed Plaintiffs' Submissions in Response to the Court's Inquiries.
1-20-75	Filed Defendant's Supplemental Brief on Remand in Opposition to Plaintiffs' Motion for Notice to the Class.
8-22-75	Enter order dated August 22, 1975: Final Injunction and Judgment entered. (DRAFT)—Will, J.
9- 2-75	Filed Defendant's Notice of Appeal.
9- 9-75	Filed Defendant's Motion for a Stay Pending Appeal.
9- 9-75	Enter order dated September 9, 1975: enter order that Defendant's Motion for a Stay Pending Appeal is denied.—Will, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN JORDAN, by his next friend, JEANETTE BRYANT, individually and on behalf of all other persons similarly situated,
Plaintiffs,
vs.
HAROLD O. SWANK, Director, Illinois Department of Public Aid; DAVID DANIEL, Director, Cook County Department of Public Aid; EDWARD J. BARRETT, Comptroller of Cook County individually and in their official capacities,
Defendants.

NO. 71 C 70

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, EQUITABLE AND OTHER APPROPRIATE RELIEF

PRELIMINARY STATEMENT

1. Plaintiff, individually and on behalf of all other persons similarly situated, seeks primarily to have this Court declare mandatory and binding on the defendants federal regulations requiring (a) determinations of eligibility, and (b) actual receipt of Aid to the Aged, Blind and Disabled (hereinafter AABD) for those determined eligible, within thirty days from the date of application as

to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD, and further declaring void all state statutes and regulations inconsistent with said mandatory federal regulations. Plaintiff also seeks a declaration that the Illinois Public Aid Code, ch. 23, Section 3-1, Ill. Rev. Stat., federal law, 45 C.F.R. § 233.20(a) (1) (2) (iii), and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution, require AABD to be paid from the date of application if the applicant meets the eligibility conditions at the time of application.

JURISDICTION

2. Jurisdiction is conferred on this court by 28 U.S.C. § 1343 (3) (4) and by 28 U.S.C. § 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of $10,000.00.

3. Plaintiff's action for declaratory and injunctive relief, and for benefits wrongfully withheld is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law or rights, privileges, and immunities secured by the Constitution and laws of the United States.

PLAINTIFFS

4. The named plaintiff, John Jordan, age sixty-one, lives at 4241 W. Calumet, Chicago, Illinois, in a room of the apartment of Jeanette Bryant.

5. John Jordan has a substantial mental deficiency and functions at the level of a small child. Jeanette Bryant generally supervises most matters affecting the everyday life of John Jordan.

CLASS ACTION

6. The named plaintiff brings this action on his behalf and pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated.

DEFENDANTS

7. Defendants are as follows: (a) Harold O. Swank, is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the public assistance programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs; (b) David Daniel is the Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid, and is responsible for administering the public assistance programs in Cook County; and (c) Edward J. Barrett, is the Comptroller of Cook County, responsible for the signing of emergency welfare checks.

FACTUAL ALLEGATIONS

8. John Jordan has a substantial mental impairment and functions at the level of a small child. He is unable to read or to recognize and count money. His intelligence is so limited that he requires supervision in most matters affecting his everyday life. His mental impairment is of a permanent nature and substantially impairs his ability to perform labor or services or to engage in any useful occupation.

9. On or about September 18, 1970 John Jordan applied for Aid to the Disabled at the Oakland office of the Cook County Department of Public Aid.

10. At the time of his application for Aid to the Disabled John Jordan met all the eligibility conditions for Aid to the Disabled, and he still meets said eligibility conditions, and is in all ways qualified for such assistance.

11. John Jordan, or friends acting on his behalf, have cooperated with the Cook County Department of Public Aid in all respects and have furnished all information requested by the Cook County Department of Public Aid and its employees.

12. The Cook County Department of Public Aid has yet to act on John Jordan's application for Aid to the Disabled and John Jordan has not received any such assistance from the defendants as of the date of filing this law suit.

13. The sole reason for the delay is that the caseworker of the Cook County Department of Public Aid assigned to John Jordan's application has not had time to act on John Jordan's application.

14. John Jordan has no income or assets except for the approximately $2.00 he earns by working at a drugstore one day a week and other infrequent odd jobs involving manual labor.

15. John Jordan is in dire need of monetary and medical assistance. He does not eat properly and is suffering from malnourishment because of lack of sufficient funds and is presently sick with a cold and cough and in need of medical care. Also he lacks vision in one eye and needs to be fitted for glasses.

has not been acted upon and approved, John Jordan has suffered and will continue to suffer irreparable injury, loss, and damage because of the lack of adequate funds to purchase those necessities requisite for a minimum standard of life compatible with health and well-being.

COUNT I

17. Count I is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. The class is composed of all persons in Illinois eligible for Aid to the Aged, Blind, or Disabled, (AABD) who are required by defendants to wait longer than 30 days after application, as to aged and blind under AABD, and longer than 60 days after application, as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

18. Illinois participates in the Federal government's Program of Aid to the Aged, Blind, and Disabled (AABD), established by the Social Security Act, 42 U.S.C. Subchapter XVI, §§ 1381 et. seq. As a condition thereof, Illinois is required to conform with the requirements of the Social Security Act and regulations promulgated thereunder by the United States Department of Health, Education and Welfare.

19. The Social Security Act provides that

> "all individuals wishing to make application under the (AABD) plan shall have opportunity to do so and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1382(a) (8).

20. At all times relevant herein, the regulations of the Department of Health, Education and Welfare have required that action on applications for assistance for the aged and blind under AABD be taken within thirty days, and action on applications for the disabled under AABD, be taken within sixty days, including for those determined eligible, the actual receipt of AABD assistance within the respective maximum time periods. Handbook of Public Assistance Administration, Part IV, Section 2200(b) (3) (4), Section 2300(b) (3) (5).

21. The defendants maintain that these abovementioned regulations are not mandatory and binding on them with respect to AABD applications.

22. As of the end of November, 1970, approximately 90% of the applications for assistance for the aged and blind under AABD made to the Cook County Department of Public Aid had been pending longer than 30 days. As of the end of November, 1970, approximately 70% of the applications for aid to the disabled under AABD made at the Cook County Department of Public Aid had been pending between one and six months and approximately 20% of the same applications had been pending for six months and over.

23. The rules and regulations of the defendant Illinois Department of Public Aid with respect to time standards for processing of AABD applications, Illinois Categorical Assistance Manual, Sections 4004-4004.3, are in violation of the requirements of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

24. Further, at all times revelant herein, Section 8255 (and subsections thereunder), Illinois Department of Public Aid, Categorical Assistance Manual, has provided that initial grants (including AABD) may be authorized only for the month in which the application has been approved, but not for any prior months.

25. Pursuant to Section 8255, Illinois Categorical Assistance Manual, plaintiff John Jordan is barred from receiving AABD benefits for October, November, and December, 1970 in violation of the Social Security Act and regulations quoted above in paragraphs 19 and 20.

26. By failing to follow the maximum, permissible time standards under federal law (quoted above in paragraphs 19 and 20) the defendants and their agents acting under color of state law have unlawfully deprived plaintiffs of AABD assistance and their rights under the Social Security Act and the regulations issued pursuant thereto.

27. No adequate administrative remedy or remedy at law is available to the plaintiffs.

28. Plaintiffs have suffered irreparable damage to their health and well-being and will continue to suffer severe and irreparable injury because of the failure of defendants and their agents to comply with the respective 30 and 60 day requirements relating to AABD applicants.

COUNT II

29. Count II is brought as a class action by the named plaintiff on his own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) (b) of the Federal Rules of Civil Procedure. The class is composed of all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied bene-

fits for the intervening period from the date of application to the month in which their grant is authorized. This class is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

30. Some eligible applicants for AABD similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in said month and began receiving assistance in and for said month.

31. Some eligible applicants similarly situated to John Jordan applied for AABD benefits in September, 1970, and were determined eligible in October, some were determined eligible in November, and some were determined eligible in December, and as a consequence, said applicants began receiving assistance in and for October, November, and December respectively, but not for any period prior to the month in which they were determined eligible.

32. By delaying determinations of eligibility, the defendants lessen expenditures to the needy for basic subsistence payments.

33. To condition the date upon which AABD benefits begin to the speed of the administrative process, is to establish wholly arbitrary and invidious classifications between similarly situated, equally needy persons.

34. Section 8255 of the Illinois Categorical Assistance Manual is invalid and unconstitutional on its face and as applied to plaintiffs in violation of the equal protection clause of the fourteenth amendment to the Constitution of the United States.

35. The policy of the defendant Illinois Department of Public Aid, and the practices of its 102 agent County De-

partments of Public Aid throughout the State of Illinois, do not require AABD assistance to be paid from the date of application when the applicant meets all of the eligibility conditions at that time.

36. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Social Security Act, 42 U.S.C. § 1381 et. seq. and federal regulations issued thereunder, 45 C.F.R. § 233.20 (a) (1) (2) (iii), and Department of Health, Education and Welfare Handbook of Public Assistance Administration, Part II, § 3300, § 4300.

37. The policy and practices of the defendants described in paragraph 35 above and in this Count are in violation of the Illinois Public Aid Code, ch. 23, Section 3-1, Ill. Rev. Stat. which provides that financial aid

> "shall be given under this Article to or in behalf of aged, blind, or disabled persons who meet the eligibility conditions . . ."

38. Plaintiffs have suffered and will continue to suffer irreparable injury to their health and well-being because of the policy and practice of the defendants described in paragraph 35 above and in this Count.

39. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

WHEREFORE, plaintiff respectfully prays, on behalf of himself and all others similarly situated, that this Honorable Court:

1. Enter a temporary restraining order enjoining the defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by failing to make determinations of eligibility and providing AABD

assistance for those determined eligible, within 30 days from the date of application as to aged and blind applicants for AABD, and within 60 days from the date of application as to disabled applicants for AABD.

2. Enter preliminary and permanent injunctions enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from failing to comply with the federal 30 and 60 day requirements with respect to applicants for AABD in the State of Illinois.

3. Enter a final judgment declaring Illinois Categorical Assistance Manual Sections 4004 and 8255 (and subsections thereunder) as applied to applicants for AABD invalid insofar as they are inconsistent with the Social Security Act and regulations issued pursuant thereto.

4. Enter a final judgment declaring that the Illinois Public Aid Code, ch. 23, Sections 3-1, Ill. Rev. Stat., the Social Security Act and regulations thereunder, and equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution require that applicants for AABD who meet the eligibility conditions for AABD at the time of their application are entitled to AABD benefits from the date of application.

5. Enter a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.

6. Allow punitive damages in the amount of $100,000.00 against Harold O. Swank.

7. Allow plaintiff his costs herein, and also grant him and all persons similarly situated, such additional or alternative relief as may seem to this Court to be just, proper and equitable.

Respectfully submitted,

/s/ Sheldon Roodman

/s/ Kenneth K. Howell

Sheldon Roodman
Kenneth K. Howell
Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Alexander J. Napoli

Cause No. 71C70 Date April 16, 1971

Title of Cause

[Caption omitted in printing]

Enter preliminary injunction. (DRAFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

This matter coming on for hearing on plaintiffs' motion for a preliminary injunction on Count I of the amended complaint, and the defendants having received notice and being represented by counsel, and the Court having considered the amended complaint, affidavits, exhibits, and memoranda presented by plaintiffs, answers and exhibits of the defendants, and also the representations and arguments of counsel for all parties in open court, and being fully advised in the premises; it makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff John Jordan applied to the Cook County Department of Public Aid on September 18, 1970, for Aid to the Disabled under the Aid to the Aged, Blind and Disabled (hereinafter "AABD") program; and

2. Plaintiff, John Jordan, age sixty-one, with the assistance of his friends, cooperated in all respects with the Cook County Department of Public Aid, furnished all information requested by the Cook County Department of Public Aid, and has been and is eligible for AABD;

3. As of January 14, 1971, the application of John Jordan for AABD had not yet been acted upon by the Cook County Department of Public Aid, and John Jordan had received no assistance whatsoever;

4. Pursuant to the temporary restraining order previously entered by this Court, John Jordan was determined eligible for AABD(D) and was issued AABD assistance. John Jordan was granted AABD assistance for the month of January, 1971 but no assistance for any period prior to January 1, 1971;

5. Numerous other persons have made applications for AABD to the Cook County Department of Public Aid and many such applications have been pending in excess of thirty days from the date of application as to aged and blind under AABD and in excess of sixty days as to disabled under AABD, with a number having been pending longer than six months;

6. Defendant Harold O. Swank is the Director of the Illinois Department of Public Aid and is charged with statewide administration of the categorical aid programs, including Aid to the Aged, Blind and Disabled, and with establishing regulations to carry out the statutory provisions of such programs. Defendant David Daniel is the

Director of the Cook County Department of Public Aid, an agency of the Illinois Department of Public Aid and is responsible for administering the categorical aid programs, including AABD, in Cook County. Defendant Edward J. Barrett is the Comptroller of Cook County, responsible for the signing of emergency welfare checks in Cook County; and

7. The named plaintiff has brought this Count I as a class action on his own behalf and on behalf of all other persons in Illinois eligible for AABD who are required by defendants to wait longer than thirty days after application, as to aged and blind under AABD, and longer than sixty days after application as to disabled under AABD, for a determination of eligibility and receipt of their first assistance check.

8. This class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of plaintiff are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief with respect to the class as a whole.

9. Those persons composing this class are, and will continue to be, irreparably injured by the failure of the defendants to process their applications and to provide AABD assistance within the maximum time periods permissible under federal regulations in that they lack sufficient funds to obtain necessary food, clothing, housing and medical care.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action and over the subject matter of the action.

2. The hereinabove findings of facts establish that the Cook County Department of Public Aid and the Illinois Department of Public Aid have not complied with the Handbook of Public Assistance Administration, Part IV, Sections 2200(b) (3) (4), 2300 (b) (3) (5) and 45 C.F.R. § 206.10(a) (3), 36 Fed. Reg. 3864 (February 27, 1971) and the Court is at this time satisfied that plaintiffs are likely to prevail on the mandatory and binding nature of these regulations. *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill., 1970) (three judge court).

3. Count I of this action is properly maintainable as a class action as defined in paragraph 7 *supra*. Federal Rules of Civil Procedure, 23(a) and (b).

4. Plaintiff and the members of the class will suffer immediate and irreparable injury if preliminary injunctive relief is denied.

5. Plaintiff and the class he represents are entitled to a preliminary injunction as hereinafter set forth.

PRELIMINARY INJUNCTION

IT IS ORDERED, ADJUDGED, and DECREED that the defendants, their agents and employees, and all persons in active concert and participation with them, are hereby enjoined from failing to make determinations of eligibility and mailing either AABD assistance or notifications of denial of assistance, within thirty days from the date of application as to aged and blind applicants for AABD, and within sixty days from the date of application as to disabled applicants for AABD in the State of

Illinois except in those cases where it is impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information within the applicant's control and understanding.

IT IS FURTHER ORDERED, that the entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day after application as to aged and blind applicants, and no later than the sixtieth (60th) day after application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth (30th) day or sixtieth (60th) day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day respectively, except in those cases where it was impossible to make a determination of eligibility because of failure or delay on the part of the applicant to provide essential information. In such latter cases, said applicants must receive a written statement explaining (a) that the denial was based on the failure or delay on the part of the applicant to provide specified essential information, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

IT IS FURTHER ORDERED, to the extent that the Illinois Department of Public Aid, Categorical Assistance Manual, Sections 4004, 8255, and 8256, and subsections thereunder, are contrary to this preliminary injunction, these sections are contrary to federal law, and are hereby declared null and void.

IT IS FURTHER ORDERED that defendants award John Jordan his entitlement to AABD assistance as hereinabove defined.

IT IS FURTHER ORDERED that this preliminary injunction be and remain in full force and effect until final hearing of this cause and until further order of this Court.

ENTER:

Alexander J. Napoli
United States District Judge

DATED: April 16, 1971.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,

Honorable Alexander J. Napoli

Cause No. 71C70 Date March 15, 1972

[Caption omitted in printing]

Brief Statement of Motion: Entry of judgment

Ordered that David L. Daniel, Edward J. Barrett and Edward T. Weaver, their agents, et al. are permanently enjoined from failing to make determination of eligibility, etc.

Further ordered that Edward T. Weaver, et al., are enjoined to release and remit AABD benefits wrongfully withheld etc.

Within 15 days of this date, Edward T. Weaver shall submit to the Court and counsel a detailed statement as to the method for effectuating relief, etc.

Defendants shall submit to the Court and counsel a detailed monthly report until such time as these reports indicate compliance with the terms of this order for six months.

Defendant Edward T. Weaver shall issue a bulletin to the Illinois Department of Pubic Aid incorporating this judgment within 15 days.

Plaintiffs prayer for punitive damages against Harold O. Swank is denied.

This Court shall retain continuing jurisdiction for all purposes. (DRAFT)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

JUDGMENT

This action came on for hearing before the Court, Honorable Alexander J. Napoli, United States District Court, and the issues having been duly heard and a Memorandum Opinion and Order having been duly rendered on February 4, 1972,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED:

1. The defendants DAVID L. DANIEL, Director, Cook County Department of Public Aid, and EDWARD J. BARRETT, Comptroller of Cook County, and EDWARD T. WEAVER, Director, Illinois Department of Public Aid, their agents, including all of the County Departments of Public Aid in the State of Illinois, their employees, and all persons in active concert and participation with them, are hereby permanently enjoined from failing to make determinations of eligibility and mailing either the first full AABD assistance check or notification of denial of assistance, within thirty days from the date of application as to applicants for aid to the aged and blind under the AABD program in the State of Illinois, and within sixty days from the date of application as to applicants for aid to the disabled under the AABD program in the State of Illinois, except as provided in paragraph 3, infra.

2. The entitlement of all eligible AABD applicants in the State of Illinois shall attach no later than the thirtieth (30th) day from the date of application as to aged

and blind applicants, and no later than the sixtieth (60th) day from the date of application as to disabled applicants. In any case in which eligibility is determined subsequent to the thirtieth day or sixtieth day, respectively, the applicant shall be entitled to AABD assistance retroactive at the very least to the thirtieth (30th) day or sixtieth (60th) day, respectively, subject only to the exception in paragraph 3, infra. If the applicant is denied AABD assistance retroactive to the thirtieth (30th) or sixtieth (60th) day, respectively, pursuant to paragraph 3, infra, said applicant must receive a written statement explaining (a) the unusual circumstances, referred to in paragraph 3, upon which the denial is based, and (b) that the applicant has the right to appeal within sixty (60) days this decision of the County Department of Public Aid.

3. The thirty-day requirement as defined in paragraphs 1 and 2 and in 45 C.F.R. § 206.10(a) (36 Fed. Reg. 3864, February 29, 1971) shall be strictly complied with except in unusual circumstances, e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency, in which instances the case record shows the cause for the delay.

4. Illinois Categorical Assistance Manual, Section 4004, and subsections thereunder, as applied to applicants for AABD are invalid insofar as they are inconsistent with the requirements of paragraphs 1 and 2, supra.

5. That the defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, his agents, including all of the County Departments of Public Aid in the State of Illinois, and employees, and all persons in active concert and participation with them, are hereby enjoined to release

and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 and April 16, 1972, and were determined eligible, as follows:

(a) For those aged and blind applicants whose first full AABD check was not mailed within thirty days from the date of application, AABD assistance for the period beginning with the thirtieth day from the date of application to the date the applicant's entitlement to AABD became effective;

(b)(i) For those disabled applicants who applied between July 1, 1968 and December 31, 1970, whose first full AABD check was not mailed within forty-five days from the date of application, AABD assistance for the period beginning with the forty-fifth day from the date of application to the date the applicant's entitlement became effective;

(ii) For those disabled applicants who applied between January 1, 1971 and April 16, 1971, whose first full AABD check was not mailed within sixty days from the date of application, AABD assistance for the period beginning with the sixtieth day from the date of application to the date the applicant's entitlement became effective.

These AABD benefits shall be mailed to those persons currently receiving AABD within eight months with an explanatory letter, said letter having been first approved by plaintiffs' attorney. Any AABD benefits received pursuant to this paragraph shall not be deemed income or resources under Article III of the Illinois Public Aid Code.

For those persons not presently receiving AABD:

(a) A certified letter (return receipt requested), said letter having been first approved by plaintiffs' attorney, shall be sent to the last known address of the person, informing him in concise and easily understandable terms that he is entitled to a specified amount of AABD benefits wrongfully withheld, and that he may claim such amount by contacting the County Department of Public Aid at a specified address, within 45 days from the receipt of said letter.

(b) If the County Department of Public Aid does not receive a claim for the AABD benefits within 45 days from the date of actual notice to the person, the right to said AABD benefits shall be forfeited and the file shall be closed. Persons who do not receive actual notice do not forfeit their rights to AABD benefits wrongfully withheld under this provision.

6. Within 15 days from the date of this decree, defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall submit to the Court and the plaintiffs' attorney a detailed statement as to the method for effectuating the relief required by paragraph 5, supra, of this Decree. Any disputes between the parties as to whether the procedures and steps outlined by the defendant WEAVER will fulfill the requirements of this Decree will be resolved by the Court.

7. The defendants shall have the continuing obligation to submit to the Court and to the plaintiffs' attorney a detailed monthly report indicating the number of AABD applications disposed of by length of time from the date of application, for each county in the State of Illinois, and such other information which accurately reflects the time for processing AABD applications, until such time that such reports establish compliance with the terms of this order for six months.

8. Defendant EDWARD T. WEAVER, Director, Illinois Department of Public Aid, shall issue a bulletin of the Illinois Department of Public Aid incorporating the essence of this judgment within 15 days from the entry thereof.

9. This judgment shall be binding upon defendants, their officers, agents, servants, employees and their successors, and upon those persons in active concert or participation with them who receive actual notice of the judgment by personal service or otherwise.

10. The prayer of the plaintiffs for punitive damages against the defendant HAROLD O. SWANK is hereby denied.

11. This Court shall retain continuing jurisdiction over this cause for all purposes.

ENTER:

Alexander J. Napoli, Judge
United States District Court

Dated: March 15, 1972

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
October 29, 1974
Before

Hon. JOHN S. HASTINGS, Senior Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. MYRON L. GORDON, District Judge*

JOHN JORDAN, et al.
Plaintiffs-Appellants,
No.s. 72-1380, 1381
vs.
JOEL EDELMAN, et al.
Defendants-Appellees.

On remand from the Supreme Court.

ORDER

On March 25, 1974, the Supreme Court entered a judgment reversing this Court's judgment in this appeal (see 472 F. 2d 985) and remanding for further proceeding consistent with its opinion. See 415 U.S. 651. Further briefs were filed and considered in this Court after the remand.

Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than

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* District Judge Myron L. Gordon of the Eastern District of Wisconsin sitting by designation.

required by the version of 45 C.F.R. § 206.10 in force on the date of application. Thus in accord with a recent amendment to 45 C.F.R. § 206.10(a) (3), entitlement shall not be required to attach to applicants for aged and blind benefits who apply after October 15, 1973, until 45 days after the date of application, rather than the 30 days provided for in the court below.

Costs to be borne by the respective parties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION TO REQUIRE NOTICE
TO MEMBERS OF THE PLAINTIFF CLASS

Now comes plaintiff, individually and on behalf of all other members of the plaintiff class, and moves this Court for an order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty (60) days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal.

In support of this motion, plaintiffs submit the accompanying memorandum.

/s/ Sheldon Roodman
Attorney for Plaintiff

Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
922-5625

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION TO DENY PLAINTIFFS' REQUEST FOR NOTICE TO MEMBERS OF THE PLAINTIFF CLASS

NOW COMES Defendant, JAMES L. TRAINOR, Acting Director, Illinois Department of Public Aid, by and through his attorney, WILLIAM J. SCOTT, Attorney General, State of Illinois and moves this Court for an Order denying Plaintiff's Request for Notice to members of the Plaintiff Class and in support states as follows:

1. Plaintiff, on remand from the United States Supreme Court and the Court of Appeals for the Seventh Circuit, wherein Plaintiff sought and was denied retroactive benefits, now seeks from the District Court an Order requiring the Defendant to notify the members of the Plaintiff Class of their possible entitlement to retroactive benefits and other relief.

2. The law of this case is the United States Supreme Court's opinion in the instant suit holding that the Eleventh Amendment of the United States Constitution constitutes an absolute bar to the assumption and exercise of any and all jurisdiction relating, concerning, or in anyway involving retroactive relief against a sovereign state without its consent.

3. An Order requiring Defendant to notify members of Plaintiff's Class of their possible entitlement to retroactive benefits is a forbidden assumption of federal jurisdiction in contravention of the Eleventh Amendment.

4. As a Federal Court is absolutely without any and all power to enter an Order regarding retroactive benefits against a state without its consent, *a fortiori* this Court is precluded from exercising its traditional equitable powers to require the requested notice.

5. If the State complies with the informal request of this Court, made upon the parties on December 18, 1974, (see attached transcript of the proceedings) to provide the Court with information regarding the size of the class, cost-benefits to Plaintiffs, cost-burden to the State, etc., so as to assist the Court in balancing the equities of issuing the requested Order, then the State will have waived its Eleventh Amendment immunity to suit.

WHEREFORE, Defendant respectfully requests this Court to deny Plaintiff's request to require Notice to Members of Plaintiff's Class.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of Illinois
160 North La Salle Street
Chicago, Illinois 60601

WILLIAM A. WENZEL
Special Assistant
Attorney General
(Of Counsel)
100 North La Salle Street
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341-4693

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

PLAINTIFFS' SUBMISSIONS IN RESPONSE TO THE COURT'S INQUIRIES

In the December 18, 1974 hearing, this Court asked the parties to provide the court answers to the following inquiries. The plaintiffs submit the following information to the Court without any input from the Acting Director, Illinois Department of Public Aid, who refuses to respond to the Court's inquiries.

Q: (a) How many members are there of the *Jordan* class?

A: 20,000—33,500.

July 1, 1968 to April 16, 1971 consists of thirty-three and one-half months. Taking April 1971 as a typical month, plaintiffs estimate that approximately 750 to 1,000 aged, blind and disabled persons per month from July 1, 1968 to April 1971 were illegally deprived of AABD benefits to which they were entitled. Accordingly for the entire period, it is estimated that there are 25,000 to 33,500 members of the plaintiff class. (It may be that there were fewer AABD applicants in July 1968 than in April 1971 and a correspondingly fewer number of AABD applicants whose rights were violated. A more conservative estimate of the number of members of the plaintiff class might be 20,000.)

IDPA April 1971 Statistics (Exhibit A attached hereto)

Number of AABD Applications Disposed Of In Excess Of Time Standards

	Aged In Excess of 30 Days	*Blind In Excess of 30 Days*	*Disabled In Excess of 60 Days*
Cook	170	20	470
Statewide	264	25	763

Total aged, blind, and disabled members whose rights were violated in April 1971 = 1,052 persons.

Q: (b) What will be the cost to the Illinois Department of Public Aid ("IDPA") of identifying the members of the *Jordan* class?

A: This cost will only be the cost of running the computer. (See pp. 4-5, *infra.*)

Q: (c) What will be the cost to IDPA of notifying members of the *Jordan* class of their possible entitlement to retroactive benefits, as set out in plaintiffs' motion?

A: No additional cost to the IDPA will be necessary. Such notices may be included in one of the regular mailings to the members of the plaintiff class.

Q: (d) What are the benefit amounts which could accrue to individual members of the class (assuming notice were furnished and members of the class prevailed on administrative appeal)?

A: The benefit amounts to individual members of the plaintiff class will range from $5.00 to $2,000.00. The average benefit amount is likely to approximate $100.00. (In *Rodriguez* v. *Swank,* 69 C 2615, the case involving AFDC recipients, $551,871.00 was paid to 5,640 persons in Cook County whose applications were delayed.)

Q: (e) What is a fair estimate of the total aggregate benefits which will be paid if notice is furnished to the *Jordan* class, pursuant to plaintiff's motion?

A: While as much as $2 million may have originally been illegally denied members of the plaintiff class, plaintiffs estimate that anywhere from $500,000 to $1,500,000 might be paid to members of the plaintiff class, depending on the notice, hearing procedures, and other factors.

Q: (f) What would be the sources of (i) administrative costs; (ii) benefit payments made pursuant to any order to furnish notice to the class?

(g) Relative to (f), is federal or other reimbursement available for either said administrative costs or benefit payments or both?

A: Plaintiffs do not know what sources the defendants may be able to draw upon for those benefits.

Plaintiffs further bring to the Court's attention the following representations previously made by the defendant's counsel in this case. (Transcript of Proceedings, May 23, 1973, attached hereto as Exhibit B; Transcript of Proceedings, May 30, 1973, Exhibit C.)

> THE COURT: . . . So, I want some understanding that everything which would be necessary to comply with this order will be retained and will be available.
>
> MR. CARNOW: You have that representation, Your Honor . . . (Transcript of Proceedings, May 23, 1973, p. 9, Exhibit B.)
>
> • • •
>
> THE COURT: On the contrary, I would like to have some sort of indication by a communication to each of the heads of the Department of each of the 102 counties, that they, in fact, have been advised they have the obligation to retain these records so that your statement in open Court isn't just a statement on behalf of the Attorney General, which doesn't get down to the people who have the records.

> MR. CARNOW: Okay. (Transcript of Proceedings, May 23, 1973, p. 12, Exhibit B.)
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> • • •
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> MR. CARNOW: Your Honor, the request for a rule is premature. We were before your Honor last week in response to the very same rule.
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> Your Honor asked us at that time to make a statement on the record as to the availability and status of files, and input information so as to guarantee payment of the retroactive assistance in the event the Supreme Court should affirm the decision of the Seventh Circuit Court of Appeals.
>
> We are back here today to represent to your Honor that all the necessary input information that we need, we have on the computer tapes. That is the first matter . . . (Transcript of Proceedings, May 30, 1973, p. 3, Exhibit C.)

OTHER EQUITABLE CONSIDERATIONS

Finally, this Court should be fully advised of the following facts established in this case (Motion for Order that Facts Be Taken As Established, filed July 27, 1971, and Order granting said Motion, July 27, 1971):

"3. From July 1, 1968 to the present, Harold O. Swank has been fully advised and known that substantial numbers of applicants for AABD in the numerous counties of the State of Illinois have not had their applications acted upon and disposed of within the federally prescribed time maximums, and that these delays were not based on failure or delay on the part of the applicants; and for substantial numbers of these AABD applicants determined eligible, the effective date of their first assistance was not on or before 30 days from the date of their application, or, for disability applicants, on or before 45 days from the date of their application.

"4. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, was fully advised and knew and understood that substantial numbers of eligible AABD applicants in the numerous counties of the State of Illinois were being denied their entitlement to AABD assistance effective 30 days from the date of their application, or, with respect to disability applicants, effective 45 days from the date of their application, by the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual which prohibited the authorization of AABD assistance for any months prior to the month in which the application was approved.

"5. From July 1, 1968 to the present, Harold O. Swank, willfully and in gross disregard of the rights of eligible AABD applicants, knew that substantial numbers of eligible AABD applicants were being deprived, contrary to the requirements of federal law, of their full AABD entitlements effective 30 days from the date of their application, or, with respect to disability applicants, 45 days from the date of their application, by reason of the operation, implementation and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual.

"6. From July 1, 1968 to the present, Harold O. Swank, Director, Illinois Department of Public Aid, knew that as [a] result of the operation, implementation, and enforcement of Sections 8255 and 8255.1 of the Illinois Categorical Assistance Manual that the amount of assistance in initial grants and the eligibility conditions for initial grants

for AABD applicants were not made on an equitable and consistent basis and resulted in inequitable and arbitrary treatment of eligible AABD applicants in similar circumstances contrary to the purposes of the Social Security Act."

Respectfully submitted,

/s/ Sheldon Roodman,
Attorney for Plaintiffs
Legal Assistance Foundation
of Chicago
64 East Jackson Boulevard
Chicago, Illinois 60604
922-5625

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MEMORANDUM OPINION

This case is now before the Court on remand from the decision of the United States Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), and the order of the Seventh Circuit dated October 29, 1974 to this Court, and pursuant to the motion of the plaintiffs to require notice to members of the plaintiff class.

The only remaining question in this case relates to fashioning the appropriate relief, if any, to deal with defendant's illegal denial of public assistance benefits to the needy aged, blind, and disabled members of the plaintiff class, which consists of all needy aged, blind, and disabled persons who applied for Aid to the Aged, Blind and Disabled (AABD) at one of the offices of the Illinois Department of Public Aid between July 1, 1968 and April 16, 1971, and whose applications were illegally delayed in processing, and who, as a result, were illegally denied benefits to which they were entitled.

Upon finding that the plaintiff class was illegally denied benefits to which its members were entitled, the District Court, Judge Napoli presiding, entered a permanent injunction "to insure compliance, present and future, with the requisite time limitation," *(Jordan v. Swank*, 71 C 70, unpublished opinion, p. 2, February 4, 1972), and also ordered the state officials to release and remit AABD payments wrongfully withheld from those members of plaintiff's class, defined in the trial court's order to include:

> Those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30 day or 45 day (60 days for Aid to the Disabled as of January 1, 1971) limits. *Jordan v. Swank*, p. 3 *supra.*

The holding of the district court was affirmed by the Seventh Circuit in *Jordan* v. *Weaver,* 472 F. 2d 985 (7th Cir. 1973); in an opinion in which the Court upheld the relief granted by the trial court and agreed that the defendants, acting under color of state law, denied eligible welfare applicants timely assistance benefits to which they were entitled by federal rights, and held that the District Court properly ordered equitable restitution of the benefits wrongfully denied. *Weaver, supra,* at 994. Moreover, the Seventh Circuit held that the Eleventh Amendment to the Constitution did not deprive the federal court of jurisdiction to order the defendants to pay assistance benefits illegally denied members of the plaintiff class.

In *Edelman v. Jordan, supra,* the United States Supreme Court reversed that portion of the Seventh Circuit's opinion which affirmed the District Court's order that retroactive benefits be paid by Illinois State officials. The Court held that, under *Ex Parte Young*, 209 U.S. 123 (1908), the prospective portion of the District Court's order which enjoined state public aid from failing to process applications within federal time limits, did not contravene the guidelines of the 11th Amendment. On the other hand, *Ex Parte Young* did not, it continued, authorize ordering recovery from state funds of an accrued monetary liability. The test established by the Court in *Edelman,* for determining which claims against the unconsenting state are barred by the 11th

Amendment and which are permitted, is whether the award is by its terms prospective in nature, even though its implementation may have fiscal consequences. This characterization avoided the labeling of relief as equitable or monetary, which the Court found to be of little analytical benefit, and focused on the substance of the relief awarded. An ancillary fiscal impact in conjunction with the state's compliance in the future with a court order was held to be permissible under the 11th Amend ment. The Court also rejected the Seventh Circuit's theory that the State of Illinois had consented to suit for retroactive relief by participating in the federal AABD program, holding that such consent will be found to exist only where set out in explicit statutory language or overwhelming textual implication.

The question here is whether the relief requested by plaintiff is prospective in nature, notwithstanding the fiscal consequences of its award, or a retroactive award of monetary relief falling within the proscription of *Edelman v. Jordan, supra.*

The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards. Rather, it involves only the sending of notices to members of the plaintiff class explaining their possible entitlement to retroactive benefits and the appropriate state administrative and appeals procedures to be followed in applying for those benefits. The requested relief, therefore, while related to possible retroactive benfits, is clearly not an award of those benefits. The plaintiffs contend that *Edelman* does not deprive this court of jurisdiction to grant the requested relief and cite authority in support thereof. The defendants argue that *Edelman* erects an absolute bar, based on the 11th Amendment,

to any order related in any possible way to payment of retroactive benefits by the state, that no existing authority supports the Court's ordering the state to send notices, and that plaintiffs are estopped by their pleadings to seek state administrative remedies.

The following language from the Supreme Court's opinion in *Edelman* indicates its concern with the award by a federal court of direct retroactive monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law, even when a monetary loss would occur therefrom:

> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled "equitable" in nature. The Court's opinion in *Ex parte Young* hewed to no such line.
>
> • • • • •
>
> But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State . . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

The instant case involves the awarding of non-monetary relief but related to the possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class. This relief falls outside the area proscribed by the Supreme Court's *Edelman* opinion.

The Eleventh Amendment seeks to avoid the clash of federal and state sovereigns. In this respect, a distinction exists between compensating individuals directly and notice that relief may be available. Even if the latter ultimately results in a direct award of benefits, federal interference in such an award would be minimal. The Eleventh Amendment by its terms denies jurisdiction to federal courts only of suits against one state by citizens of another or by citizens or subjects of a foreign state. While this has been read to preclude federal courts from ordering payments by states of state funds, it has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state, e.g., writs of habeas corpus, injunction, mandamus, etc. Nor, do we believe, may it be used by a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid claims against it. Accordingly, we conclude that ordering the sending of notices is not barred by the 11th Amendment to the Constitution.

Among the courts addressing the precise issue before us, none has denied the motion to require the sending of such notices. In *Grubb* v. *Sterrett*, 315 F. Supp. 990 (N.D. Ind. 1970), a pre-*Edelman* case, the court held a statewide welfare regulation to be contrary to the Social Security Act and, therefore, invalid under the Supremacy Clause. Because the state had provisions for hearings regarding corrective retroactive payments, the court did

not grant the retroactive monetary relief; rather, it remanded the claim for back benefits to the Indiana Department of Public Welfare and required the state to send notices to members of the plaintiff class. This course obviated the Court's consideration of any 11th Amendment objection to its jurisdiction to award retroactive monetary benefits.

In *Doe* v. *Gillman*, 479 F. 2d 646 (8th Cir. 1973), also pre-*Edelman*, the Eighth Circuit vacated a District Court decree requiring the Iowa Department of Public Aid to make retroactive payments on the ground that it was unnecessary to decide the 11th Amendment question, since the Iowa Department of Public Aid regulations specifically required the payment, following state administrative hearings, of benefits illegally withheld. It also upheld that portion of the District Court's order which held a section of the Iowa Code violated the Social Security Act and required the state to send a notice of eligibility to those previously denied benefits.

In *Morris v. Houston*, 0-250-73 C.A. (W.D. Mich. Oct. 18, 1974), the Court held that a Michigan Public Aid Department's regulation excluding the unborn child from the definition of a "dependent child" was contrary to the Social Security Act.* The Court recognized that *Edelman* precluded the retroactive payment of benefits, but, regarding the question of whether the Amendment barred the remanding of plaintiffs to state fair hearing procedures in order to recover benefits illegally denied, Chief Judge Fox held:

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* The Sixth Circuit by order reversed *Morris v. Houston* on the legality of the "unborn child" exclusion, based on the Supreme Court's opinion in *Alcala* v. *Burns*, 420 U.S. 575, 95 S. Ct. 1180, 43 L. Ed. 2d 469 (March 18, 1975).

The Court need not enter an order remanding the plaintiffs to state administrative procedures, because these procedures are available to them without such an order . . . The Eleventh Amendment operates as a jurisdictional bar on this Court in limited circumstances, but the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits. The Court cannot presume that the state will violate its own regulations but should it do so, the aggrieved parties will certainly have an action in state or federal court. The members of the plaintiffs' second subclass [needy pregnant women and their unborn children who applied for AFDC benefits in Michigan after the date of the injunction] cannot utilize the state procedures unless they are notified of their existence. Therefore the injunction to be issued will enjoin the defendants to inform the members of the plaintiffs' second subclass that they may apply for retroactive benefits through the state hearing procedure, and shall also give the members of the subclass precise information as to the means of application. In these and other particulars, the notice should follow the form and content required by state and federal regulations for similar notifications, due allowance being made for the special circumstances of this case. *Houston* at 15-16.

The foregoing cases clearly demonstrate that the 11th Amendment is no bar to the requested relief.

The cases cited by defendants in support of their position do not address the issue of notice. *Alcala v. Burns,* 494 F.2d 743 (8th Cir. 1974), held that the 11th Amendment prohibited an award of retroactive payments. That Court, which also decided *Doe v. Gillman, supra,* based its holding on an earlier decision in which it directly resolved the question of whether the 11th Amendment bars retroactive relief. *Taylor v. Lavine,* 497 F.2d 1208, 1213 (2d Cir. 1974) is inapposite, even though the Second Circuit considered plaintiff's appeal from the District Court's denial of retroactive payments, inasmuch as the Second Circuit reversed the District Court's finding that the New York regulations were invalid under the Social Security Act. In *Taylor v. Hill,* 377 F.Supp. 495 (W.D. N.C. 1974) the District Court granted a preliminary injunction on the grounds, *inter alia,* that plaintiff would suffer irreparable harm resulting from the court's inability to award retroactive payments, where welfare benefits have been unlawfully withheld. *Barron v. Bellows,* 496 F.2d 1198 (5th Cir. 1974), simply denied retroactive injunctive relief and financial assistance to members of the plaintiff class. Similarly, *Owens v. Roberts,* 377 F. Supp. 45 (M.D. Fla. 1974), in light of *Edelman,* granted defendant's motion to amend a judgment which had awarded retroactive benefits to members of the affected class. A more relevant consideration in *Owens* was the Court's determination of whether the state should be required "to identify the members of the affected class" for the purpose of "grandfathering" them into the Federal Supplemental Security Income Program, which assumed responsibility as of January 1, 1974 for the state AABD program. The Court concluded that such a burden should not be placed on the state because of, *inter alia,* the inordinate expense and extant alternative means of identification. It is noteworthy that the Court apparently assumed that the 11th Amendment would not bar such an order.

Defendants contend in a supplemental brief that the Seventh Circuit's denial of plaintiffs' request for declaratory judgment on remand and defendants' assertions before the Seventh Circuit, in opposition to plaintiff's request which argued that the 11th Amendment barred any type of relief pertaining to retroactive benefits, settled the question of whether the relief presently requested by plain-

tiffs is barred by the 11th Amendment. We disagree. The Seventh Circuit Order, pursuant to *Edelman*, only reversed the District Court's award of retroactive benefits and ordered the modification of the District Court judgment with respect to the retroactive entitlement of Illinois applicants for aged and blind benefits under 45 C.F.R. § 206.10. Even if the Court of Appeals had held that the *Edelman* decision bars the granting of declaratory relief regarding retroactive benefits, such a holding would not necessarily bar the relief now requested by plaintiffs.

Defendant's final contention is that plaintiffs are estopped by their pleadings to request that notices pertaining to the existence of state administrative remedies be sent out. It cites *Sinclair Refining Company v. Thompkins*, 117 F.2d 596 (5th Cir. 1941); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969); *Hall v. U.S.*, 314 F.Supp. 1135 (N.D. Cal. 1970), in support of this contention.

The cases cited by defendant stand for the proposition that allegations of fact pleaded by a plaintiff are binding. In *Thompkins*, plaintiff's allegation that a small blaze existed when she threw kerosene on the fire, which led to an explosion, was conclusive of her contributory negligence. In *Hopper*, plaintiff's allegation that his termination was not a breach of contract was conclusive as to the non-existence of the contract. In *Hall*, plaintiff's allegations relating to when he learned that his wife was sterile and that it allegedly resulted from negligent treatment by a military doctor was binding in determining whether his action was time barred.

In the instant case, plaintiffs' allegations that "[n]o adequate administrative remedy or remedy at law is available to the plaintiffs" are not factual assertions which would be binding on plaintiffs. Rather they are legal judgments. As such, they are subject to judicial scrutiny and do not fall into the category of allegations relating to objective phenomena or facts existing irrespective of an observer's interpretation. Even if the instant allegations were not distinguishable from those present in the authorities cited by defendant and even if we found that those allegations were binding upon the instant request, that finding would not have the effect of precluding the sending of notices, inasmuch as it is not inconsistent for plaintiff to maintain that "adequate" remedies are not available and simultaneously request that notices be sent regarding the existence of available albeit less than adequate remedies. In each of the cases cited by defendants the plaintiff's later position was inconsistent with the binding pleadings.

For the foregoing reasons, plaintiffs' motion to require the State of Illinois to send plaintiff class members notices regarding the existence of possible state administrative remedies is granted. In this connection, defendants have requested a stay of the effective date of our order pending appeal to the Seventh Circuit and ultimately, perhaps, to the United States Supreme Court. While it is logical that no notices should be sent until the validity of our order has been finally determined, we see no reason why the state should not currently compile the names and addresses of all members of the plaintiff class who would be entitled to such notice. There has been serious question raised as to whether the state has compiled and is maintaining the necessary records from which such a list could be prepared. The claims here relate to the period July 1, 1968

—April 16, 1971. In order to protect against any possible loss or destruction of the necessary records and to insure that notices can be sent out immediately in the event our order is approved, the state is ordered to prepare the list of names and addresses of the persons to whom such notice would be sent but sending of the notices is stayed pending appeal. An appropriate order will enter.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT JUDGE

Dated: August 22, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

FINAL JUDGMENT AND INJUNCTION

This cause coming on to be heard pursuant to the order and mandate of the Seventh Circuit, and the motions of the parties, and the memorandum opinion of the Court issued August 22, 1975,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Plaintiffs' motion to require notice to members of the plaintiff class is granted.

2. The defendants' motion to deny plaintiffs' request for notice to members of the plaintiff class is hereby denied.

3. Paragraph 5 of the judgment in this cause entered on March 15, 1972, granting retroactive benefits to members of the plaintiff class is hereby vacated, and the following paragraphs are substituted in place thereof as paragraph 5.

> The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, attorneys and those in active concert and participation with them, are hereby enjoined, to notify each member of the plaintiff class (as defined below) that he has been denied assistance benefits, with the amount specified in each individual case, and that he may attempt to recover those benefits by signing a notice of appeal (which is to be enclosed therein, together with a return envelope) contesting the denial of those benefits, and returning it in the enclosed envelope. The defendants shall send to each member of the plaintiff

class, except those persons who previously were mailed written notice of the denial of said benefits, the notice attached hereto as Exhibit A. The notice of appeal to be sent to members of the plaintiff class is attached hereto as Exhibit B.

The members of the plaintiff class are defined as all applicants for Aid to the Aged, Blind, and Disabled (hereinafter "AABD") in the State of Illinois who applied between July 1, 1968, and April 16, 1971, and were determined eligible for AABD, as follows:

(a)

Aged and blind applicants whose first full AABD check was not mailed within thirty (30) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the thirtieth (30th) day from the date of application to the date the applicant's entitlement to AABD became effective.

(b)

(i) Disabled applicants who applied between July 1, 1968, and December 31, 1970, whose first full AABD check was not mailed within forty-five (45) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the forty-fifth (45th) day from the date of application to the date the applicant's entitlement became effective.

(ii) Disabled applicants who applied between January 1, 1971, and April 16, 1971, whose first full AABD check was not mailed within sixty (60) days from the date of application. These persons may appeal the denial of AABD assistance for the period beginning with the sixtieth (60th) day from the date of application to the date the applicant's entitlement became effective.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys shall submit to the Court within sixty (60) days of

this judgment the names and addresses of all members of the plaintiff class, and the amount of benefits denied in each individual case. The sending of the notices to each individual member of the plaintiff class, as required above, however, shall be stayed pending appeal, if any, of this cause.

The defendant James L. Trainor, Director, Illinois Department of Public Aid, his agents, employees, and attorneys, shall issue timely instructions to caseworkers, hearing officers, and other appropriate personnel consistent with, and in furtherance of, this final judgment and injunction.

/s/ HUBERT L. WILL
UNITED STATES DISTRICT COURT JUDGE

Date: August 22, 1975

EXHIBIT "A"

Date:

Illinois Department of Public Aid

NOTICE OF RIGHT TO APPEAL DENIAL OF BENEFITS

When you applied for Aid to the Aged, Blind, and Disabled in the period between 1968 and 1971, your application was delayed in processing. As a result of the delay, you were denied public assistance to which you were entitled in the amount of $———. As a result of a federal court order, the Illinois Department of Public Aid is required to notify you of this denial of benefits, and is also required to inform you that you may file a notice of appeal challenging the denial of benefits. Enclosed herewith is a Notice of Appeal which you should complete and mail to the Illinois Department of Public Aid in the enclosed postage paid envelope, if you wish to appeal the denial of your benefits. This notice of appeal must be mailed within sixty (60) days from the date of this notice.

If you have any questions in connection with this matter, you may call the attorneys in the federal lawsuit who have been representing the class of aged, blind, and disabled persons who were illegally denied benefits. (Legal Assistance Foundation of Chicago, [312] 939-5940. Call Collect.)

EXHIBIT "B"

Illinois Department of Public Aid

NOTICE OF APPEAL

I, _____ of _____
Appellant's Name Street or RFD

_____, Illinois _____
City County Telephone Number

hereby appeal to the Illinois Department of Public Aid for a fair hearing because of the

(X) action
or (check one)
( ) inaction

of the _____ County Department of Public Aid. My reason for requesting a fair hearing is: (Please be as clear and specific as you can in stating the county department action (or inaction) from which you are appealing.)

The department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled.

Your Case Number _____

Type of Program_____

_____
Appellant's Signature

Please notify:

Legal Assistance Foundation of Chicago
Re: JORDAN Case
64 East Jackson Boulevard
Chicago, Illinois 60604

_____
Date

*My race is: [ ] White; [ ] Negro; or [ ] Other

FOR AGENCY OFFICE USE:
TO BE COMPLETED BY THE COUNTY DEPT.

Date this Notice of Appeal received _____

Date of written or oral request for this hearing, if preceding this form _____

Date of Decision appealed from _____

Case Name _____ Case Number _____

NOTE: The county department will assist you in preparing the above form. Upon completion, file the notice with the county department, or with the Illinois Department of Public Aid, Hearing Officer, 209 West Jackson Blvd., Room 801, Chicago, Illinois 60606. You are entitled by law to a final decision on your appeal within 90 days from the time you requested the appeal, unless you have requested a delay of your hearing.

*Federal reporting requirement

IN THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1908
JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 71 C 70 —HUBERT L. WILL, *Judge.*

Argued December 2, 1975 — Decided March 10, 1977

Before PELL and BAUER, *Circuit Judges,* and WHELAN, *District Judge.**

WHELAN, *District Judge.* This action has, prior to this appeal, been upon appeal to this court and thereafter was before the United States Supreme Court after a grant of certiorari. Involved in the earlier appeal was the validity of a judgment of the United States District Court whereby the Defendants-Appellants (officials of Illinois Department of Public Aid) were ordered to process Aid to the Aged, Blind, or Disabled Program applications in the

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

State of Illinois in conformity with federal regulations. Defendants-Appellants were also ordered to release and remit payments under such Program which had been wrongfully withheld from applicants, who were members of the original plaintiff class as framed in the complaint.

On the first appeal the Defendants-Appellants contended that the Eleventh Amendment to the United States Constitution barred the exercise of the court's equitable powers to award such retroactive benefits against the state. On such first appeal, this court affirmed the judgment of the District Court, holding that the Eleventh Amendment did not bar the exercise of the court's equitable power to award such retroactive benefits against the state. The court also held, in the alternative, that the State of Illinois has constructively consented to suit by participating in the Federal Aid to the Aged, Blind, or Disabled Program.

In *Edelman v. Jordan*, 415 U.S. 651 (1974), the United States Supreme Court stayed the granting of the retroactive relief pending appeal and thereafter reversed the decision of this court which had allowed such retroactive relief. The Supreme Court at page 677 of its opinion stated: "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires payment of funds from the state treasury. . . ." This court thereafter remanded the case to the District Court; such order of remand stated in pertinent part: "Pursuant to the mandate of the Supreme Court it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application."

On remand, the District Court heard a motion of Plaintiff-Appellee to require notice to members of the plaintiff class. The District Court Judge granted such motion and ordered that the officials of the Illinois Department of Public Aid send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application was delayed in processing during the period between 1968 and 1971. Such notice required the state officials to set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. It appears from the briefs of both parties that such notice was ordered sent to approximately 20,500 persons. Also, the notice advised the particular person notified that such person "may file a notice of appeal challenging the denial of benefits." The court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." Such notice of appeal by its terms set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.A.B.D. application and as a consequence denied me benefits to which I am entitled."

On this appeal Defendants-Appellants contend that the order of the United States District Court requiring such notice, together with a form of notice of appeal, to be mailed to each member of the plaintiff class, is barred by the Eleventh Amendment. We hold that the Eleventh Amendment constitutes a bar to the trial court's order requiring such notice.

The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by

the State of Illinois that each member of the plaintiff class was "denied public assistance to which you were entitled" in an amount to be stated in such notice. Unquestionably the person receiving such notice would thereupon file the notice of appeal which was forwarded to him or her. In view of the admission of liability by the state, the course of such appeal would automatically result in payment of state funds. The payment would occur as the result of the judgment of the District Court here appealed from.

The District Court stayed that part of the order directing the mailing of the notice and form of notice of appeal pending appeal of this case; however, that portion of the order requiring the Illinois Department of Public Aid to compile a list of all of the persons entitled by the terms of the order to such notice was not stayed pending appeal.

The Supreme Court in *Edelman* at pages 677-678, makes it very clear that the Eleventh Amendment is in substance a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case.

Fitzpatrick v. *Bitzer,* 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976), does not support the position of Plaintiffs-Appellees. It is true that the Supreme Court there reversed the decision of the Court of Appeals which had barred monetary relief to the appellants therein. However, the relief sought against the State of Connecticut in *Fitzpatrick* was for, *inter alia,* damages for past acts of Connecticut state officials in violation of Title VII of the Civil Rights Act of 1964. The Supreme Court made it clear that it was granting the right of employees to sue the state

for violation of Title VII because of the power given to Congress by Section 5 of the Fourteenth Amendment to enforce the substantive provisions of the Fourteenth Amendment. Section 5 specifically provides that the Congress shall have power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. Thus, Congress had the power in passing Title VII to include states as parties-defendant in order to enforce the rights of persons to have equal protection of the laws. It also had the power to require a state to satisfy its duties with respect to its treatment of private individuals.

Fitzpatrick further indicates that Plaintiffs-Appellees in the instant case are not entitled to the relief given by the District Court. In *Fitzpatrick* the Supreme Court restated the *Edelman* doctrine when, in referring to *Edelman,* it stated: "We concluded that none of the statutes relied upon in *Edelman* contained any authorization by Congress to join a state as a defendant. . . . The provisions of the Social Security Act relied upon by plaintiffs [in *Edelman*] were held by their terms not to 'authorize suit against any one.' " *Fitzpatrick* v. *Bitzer, supra,* 427 U.S. at 452, 96 S. Ct. at 2669. Nor do any of the other authorities cited by Plaintiffs-Appellees support their position.

It should further be noted that the terms of the judgment of the District Court here on appeal fixed various times during which the various members of the plaintiff class could appeal the denial of A.A.B.D. assistance.

When the action is, in essence, one for the recovery of money from the state, and the action is not brought under a statute enforcing a right against a state under the Fourteenth Amendment, the state is entitled to invoke its sovereign immunity from suit. *See Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459 at 464 (1945).

Subsequent to oral argument in this case, pursuant to former Circuit Rule 29 (now Rule 11), the appellees cited the case of *Lewis v. Shulimson,* 534 F.2d 794 (8th Cir. 1976), *stay granted,* 426 U.S. 902, as supporting their principal position. We find the support lacking. It is true that that abbreviated opinion does approve a district court order requiring a state welfare division to notify members of the appellee's class who were denied medical assistance in violation of the district court's order. The state authorities in *Lewis* challenged the order on the basis that it would require the expenditure of public funds in the process of notification, thereby violating the Eleventh Amendment. The court held that this processing expense was permissible in that it had only an ancillary effect under *Edelman.* The court pointed out in *Lewis,* at 795, that the district court order did not require the state to make any retroactive medical payments. That the processing expenditures were all that was involved is clear from the district court opinion referring to the fact that the complaint sought an injunction "from *further* denying medical assistance." [Emphasis added.] *Lewis v. Shulimson,* 400 F. Supp. 807, 808 (E.D. Mo. 1975).

Appellees' reliance upon *Lewis* is misplaced. In the present case the state authorities are contending that the district court order while not directly ordering retroactive payments is for all practical purposes doing so. We agree. Further, we note various district court cases cited to us regarding the matter of giving and processing notification of benefits to welfare recipients, some of these cases being pre-*Edelman.* We find no persuasive authority in these cases contrary to the position we reach in the present case.

The language of *Edelman* directed to the prior order in this litigation appears to us to be directly applicable to the district court order now under review:

> [I]t is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

415 U.S. at 668. In sum, we decline to countenance the accomplishment of a prohibited end by indirection. The action of the district court in fact did not comply with our earlier remand. That remand ordered, in substance, that the district court judgment be modified to insure that entitlement need not attach to Plaintiffs-Appellees for retroactive benefits and the judgment was not so modified but instead was recouched in a form designed "in practical effect" to achieve the original goal.

For the foregoing reasons, the judgment of the district court dated August 22, 1975, is reversed and the cause is remanded to the district court for further proceedings consistent herewith.

REVERSED and REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1908

JOHN JORDAN, et al.,

Plaintiffs-Appellees,

v.

JAMES L. TRAINOR, Director, Illinois Department of Public Aid, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 70—Honorable HUBERT L. WILL, *District Judge.*
ARGUED JUNE 8, 1977—DECIDED OCTOBER 19, 1977

Before, FAIRCHILD, *Chief Judge,* and SWYGERT, CUMMINGS, PELL, SPRECHER, TONE, BAUER, and WOOD, *Circuit Judges.*

WOOD, *Circuit Judge.* In 1971 plaintiffs filed this class action seeking declaratory and injunctive relief alleging failure of the Illinois Department of Public Aid to process applications for assistance under the Aid to the Aged, Blind and Disabled program (AABD) within the time limits prescribed by federal regulations. Plaintiffs sought to have entitlement attach at the end of the federal time limit. The district court in an unreported decision required by permanent injunction that defendants comply in the future with the time limits and awarded retroactive benefits. Upon appeal that judgment was affirmed. *Jordan v.*

Weaver, 472 F.2d 985 (7th Cir. 1973). The Supreme Court granted certiorari, and in a five to four decision reversed upon Eleventh Amendment grounds so much of the decree which ordered retroactive payment of benefits found to have been wrongfully withheld but left undisturbed the purely prospective relief. *Edelman v. Jordan,* 415 U.S. 651 (1974). Thereafter this court remanded the case to the district court. After remand, plaintiffs filed a motion for an "order requiring the defendants to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty days through the state's administrative procedures, and requiring said defendants to include with such notice a form returnable to the Department of Public Aid upon which such persons may indicate their desire to appeal." Over the defendant's Eleventh Amendment objections the motion was allowed. *Jordan v. Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975). The trial court's order set forth the form of the Notice of Right to Appeal Denial of Benefits to be used by the Department and the Notice of Appeal to be used by the applicant. On appeal of that order a panel of this court reversed holding that the Supreme Court in *Edelman* had interpreted the Eleventh Amendment to be a jurisdictional bar precluding any type of retroactive relief. *Jordan v. Trainor,* 551 F.2d 152 (7th Cir. 1977). A Petition for Rehearing In Banc was granted.[1]

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1. United States District Judge Francis C. Whelan of the Central District of California was a member of the three-judge panel which decided *Jordan.* Judge Whelan did not, however, participate in this court's vote on plaintiffs' suggestion for rehearing in banc. See FED. R. APP. P. 35.

The issue being reconsidered is whether or not the Eleventh Amendment bars the proposed limited use of the court's equitable power in these circumstances. Defendants do not urge upon us the view that there is no "case or controversy" as required by Article III, Section 2 of the Constitution. That problem was referred to by Judge Garth in his concurring opinion in *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (3rd Cir. 1976). In the present case the trial court determined that the class included applicants who had applied for AABD since July 1, 1968, and whose applications were not timely processed as required by federal regulations. In its judgment, in addition to its award to applicants of past benefits withheld, the trial court held certain applicable state regulations to be invalid and granted a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants. Only the retroactive award provision was struck down by the Supreme Court. The basic controversy did not disappear. The notice problem we now face is a related aspect of the class controversy controlled by the trial court's permanent injunction.

The specified notice required by the district court to be sent to members of the class stated in part that "you were denied public assistance to which you were entitled in the amount of $ . . . . ." Enclosed with that notice was the other form, "Notice of Appeal," to be signed by the applicant and returned to the Illinois Department of Public Aid. That notice contained the language "The department illegally delayed in the processing of my AABD application, and, as a consequence denied me benefits to which I was and am entitled." We agree with the panel's opinion that

> "The sending of the particular notice and the form of notice of appeal will order, in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois. In the form of notice to be sent, there is an admission by the State of Illinois that each member of the plaintiff class was 'denied public assistance to which you were entitled' in an amount to be stated in such notice."

That admission was compelled by the order of the district court and appears to be a type of money judgment against the state. We agree that the district court's order controverts the Eleventh Amendment in this regard and cannot be sanctioned.

The objectionable content of the notice forms are not in keeping with the views expressed by the trial judge in his Memorandum Opinion to which they were attached. With those views, but not the forms, we agree.

The more delicate variation of that issue is the constitutionality of a mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided. Those notices would not be handicapped by any federal predetermination of state liability. The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state.

This court is not in agreement on the constitutionality of such limited relief as an adjunct to the purely prospective relief granted. Although we view it as a close question, we hold that in the context of this case a permissible notice may be fashioned within the strictures of the Eleventh Amendment. There is no longer a claim that the state

has waived its constitutional protection under the Eleventh Amendment. It is likewise conceded that the state, not merely an officer, would be directly involved in any relief granted. We realize there is little or no supporting precedent directly in point to give us complete confidence in our view, but we shall examine what we find.

We look for guidance to *Edelman v. Jordan, supra.* As the Court pointed out, the rule "has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred . . . ." 415 U.S. at 663. "*Ex parte Young* [209 U.S. 123 (1908),] does not extend so far as to permit a suit which seeks the award of an accrued monetary liability which must be met from the general revenue of a State. . . ." *Id.* at 664. The Court also noted that the retroactive portion of the district court's order required "the payment of a very substantial amount of money." *Id.* We learn also that the character of any relief ordered which may in practice resemble a money judgment payable out of the state treasury cannot be changed or made acceptable by labeling it "equitable" in nature. *Id.* at 666. What had been labeled "equitable restitution" was found to be indistinguishable in many aspects from an award of damages against the state. *Id.* at 668.

The form of notice we envisage would not create a "liability" against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state would be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state. The defendant makes no issue out of any incidental administrative expense connected with the preparation or mailing of the notice. It has suggested in the record that the notice could be included in the regular monthly mailing.

The necessary information comes from a computer. There is no indication that the administrative expense would be substantial.

Looking further at *Edelman,* we see some suggestion that the Eleventh Amendment, even apart from *Ex parte Young,* may not be a total and complete bar so long as it does not constitute a retroactive award for damages to be paid by state funds. The Court commented that "we must judge the award actually made in this case, and not one which might have been differently tailored in a different case. . . ." 415 U.S. at 665. Similarly, the Court recognizes that "[a]s in most areas of the law, the difference between the type barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between night and day." *Edelman* specifically overruled three recent cases in which the Supreme Court had summarily affirmed district court judgments requiring state directors of public aid to make similar retroactive payments as were originally ordered in this case by the district court. Although the list may not be intended to be complete, there is no mention of the three-judge decision, *Grubb v. Sterrett,* 315 F.Supp. 990 (N.D. Ind. 1970), summarily affirmed 400 U.S. 922 (1971).[2] That decision

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2. Footnote 13 of *Edelman* lists only the following cases: 1) *State Dept. of Health and Rehabilitative Services* v. *Zarat,* 407 U.S. 918 (1972), aff'g 347 F. Supp. 1004 (S.D. Fla. 1971); 2) *Sterrett* v. *Mothers' and Children's Right Organization,* 409 U.S. 809 (1972), aff'g unreported order and judgment of District Court (N.D. Ind. 1972) on remand from *Carpenter v. Sterrett,* 405 U.S. 971 (1972); 3) *Gaddis v. Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1969) (order at CCH Poverty Law Rep. ¶ 10,506 [1968-1971 Transfer Binder]), aff'd *per curiam sub nom. Wyman v. Bowens,* 397 U.S. 49 (1970).

provided for notice to members of the class whose applications for Indiana public assistance had previously been denied under a regulation subsequently held to be invalid. The notice was to contain no prejudgment of state liability. The state was left to make the eligibility determination according to federal and state regulations. The cases specifically overruled by the Court, on the other hand, provided for actual retroactive payments. Thus we deem the omission of *Grubb* from the cases specifically overruled to be of some significance. As we read *Edelman*, we believe that the case allows limited flexibility and does not foreclose the modified relief we approve.

Plaintiff cites *Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973), *cert. denied*, 421 U.S. 920 (1975), as post-*Edelman* authority which left in effect, after a partial reversal, a requirement that the Iowa Department of Social Services send notice of eligibility to applicants previously denied benefits. The court of appeals found it unnecessary to resolve the Eleventh Amendment issue of retroactive payments since the court assumed that Iowa would follow its own regulations and that any retroactive payments owing would be made. The record in this case does not suggest that we indulge in a similar assumption to avoid a constitutional issue. Defendant dismisses *Gillman* both as a pre-*Edelman* case and because it avoids the Eleventh Amendment issue. Although the case was decided by the Eighth Circuit prior to *Edelman*, certiorari was denied by the Supreme Court after *Edelman*.

The plaintiff also cites *Lewis v. Shulimson*, 534 F.2d 794 (8th Cir. 1976), *cert. denied*, 430 U.S. 940. In that case notice was required to be given by the state to those in the class who had previously been denied medical assistance in violation of the court order. However, no retro-

active payments were involved. The decree was prospective in nature. *Lewis* is only slightly related to the present problem.

The defendant has called to our attention the recent case of *Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare*, 551 F.2d 2 (3rd Cir. 1977). In that case the state had for a prior period of time attempted to collect from recipients certain previously paid social security benefits as reimbursement to the state. The plaintiff class alleged that this had been accomplished in an illegal manner. The practice of the state had been terminated prior to suit, but some applicants were still making reimbursement payments to the state under agreements entered into during the prior period. The district court did not attempt the restitution to applicants of benefits wrongfully collected by the state and denied declaratory and injunctive relief since current state practices were not in violation. The district court did, however, require the state to serve notice on two sub-classes. Those welfare recipients who were currently reimbursing the state under the prior agreements were to be notified that they were under no legal obligation to continue making reimbursements out of their federal disability benefits. Those welfare recipients who had been previously coerced and misled into making reimbursements in violation of the regulations were to be notified that as a matter of state law they might have a cause of action against the state. Each member of the appellate panel voted to reverse, but for varying reasons. Chief Judge Seitz was of the opinion that *Edelman* controlled since he viewed the district court's order as being "based on a past breach of legal duty" and granting relief not a "necessary consequence of compliance in the future with a substantive federal question determination." Judge Garth believed the Eleventh Amendment issue to be "border-

line," but reversed on the basis that there was no case or controversy. Judge Hunter dissented, and rather than require dismissal of the complaints voted to reverse and remand on the grounds that the requirements for summary judgment had not been met. He disagreed that *Edelman* required dismissal and would draw "no line so sharp" between the past and present aspects of that case. He further disagreed with Judge Garth by finding there to be a justiciable case. There are some factual distinctions between that case and the present case, but they are not so significant as to avoid conflict in principle with our present decision on the Eleventh Amendment issue. Since Judge Garth considered the Eleventh Amendment issue a borderline question and Judge Hunter was of the view that the Eleventh Amendment did not bar the notice relief, although he also recognized some problems with the form of the proposed notice, we do not view that case as strong authority to the contrary.

If our task was only to enforce the federal regulations, use our equitable powers and heed the admonition of the 82nd Psalm to "Do justice to the afflicted and needy," our decision would not be so difficult. It appears that the needed list of applicants and information is already available from the state computers and that the administrative cost to the state of the contemplated modified notice procedure would not be significant. No judgment for any award of damages against the state comes from the federal court. The members of the class will be given no more by the proposed modified notice than what they would have gathered by sitting in the courtroom, or by reading and listening to news accounts had the case attracted any attention. As for the state, our decision means only that if an appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any

back payment may be due the applicant. It cannot be strongly argued that the problem did not arise in part from a past breach. The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment. We reverse and remand for additional proceedings not inconsistent with this opinion.

PELL, *Circuit Judge,* dissenting.

Being of the opinion that the constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed, I respectfully dissent. The fact that the result may appear desirable from a societal point of view should play no part in the decision.

The case before the panel of this court, reported at 551 F.2d 152, involved, in my opinion, such an effort at indirection. The *en banc* majority opinion agrees that the panel properly struck down as violative of the Eleventh Amendment the order of the district court. The validity of that order was all that was presented to the panel for decision. The *en banc* majority opinion then proceeds to attempt to prescribe a constitutionally inoffensive form which the state authorities would be required to send to those persons precluded by the Supreme Court decision from collecting by direct judgment the very amounts which would be involved in the notices to be sent.

The Supreme Court in reversing the first order of the district court as affirmed by this court did so on the basis that the order would result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," 415 U.S. at 668.

Now, notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

This court, in my respectful opinion, should not lend its hand to such subterfuge.

TONE, *Circuit Judge,* dissenting. Judge Wood's opinion for the court presents an appealing solution to the Eleventh Amendment problem. In my view, however, the Supreme Court's decision that a federal court may not retroactively enforce the plaintiffs' rights against the state, *Edelman v. Jordan,* 415 U.S. 651, 658, *et seq.* (1974), precludes us from entering an order aimed solely at retroactive enforcement, albeit in another form.

BAUER, *Circuit Judge,* dissenting. I join in the dissents of Judges Pell and Tone.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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No. 77-841

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

SHELDON ROODMAN
JAMES D. WEILL
Attorneys for Respondents
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Seventh Circuit is now reported. Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977).

JURISDICTION

Respondents agree that this Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the Eleventh Amendment a jurisdictional bar to a decree which does not purport to adjudicate the monetary liability of state officials, but instead merely requires the state officials to send notices advising plaintiffs that there are available state administrative remedies, as established by the Illinois legislature, to challenge the legality of the denial of benefits?

STATEMENT OF THE CASE

Respondents supplement the statement of the case as set forth in the petitioner's brief insofar as it fails to articulate the reasoning of the trial court, Jordan v. Trainor, 405 F. Supp. 802 (N.D. Ill. 1975), and the reasoning of the en banc decision of the Seventh Circuit, Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977). Upon remand from Edelman v. Jordan, 415 U.S. 651 (1974), the plaintiffs filed a motion for an order requiring the defendants only to notify the members of the plaintiff class of the pre-existing state administrative procedures for recovering public assistance benefits wrongfully denied. The trial court in a well-reasoned opinion concluded that the Eleventh Amendment, as interpreted in Edelman, barred an "award by a federal court of direct monetary relief against a state, rather than orders requiring the state to change existing policy or to inform citizens of their rights under state and federal law ..." Jordan v. Trainor, 405 F. Supp. at 805. As to the notice relief sought, the trial court concluded that it fell outside the area proscribed by the Edelman opinion because the Eleventh Amendment was never intended to allow "a state to keep secret the fact that a number of its citizens may, under established state procedures, have valid claims against it." Id. at 806.

The en banc decision of the Seventh Circuit agreed with the reasoning of the trial court. First, the court analyzed the Edelman decision which held that the Eleventh Amendment barred a federal court from imposing against the state "the award of an accrued monetary liability" which was indistinguishable from an award of damages. (415 U.S. at 664) However, the en banc decision noted that notice relief "would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court."[1/] 563 F.2d at 876. In

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1/ "The parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state." Jordan v. Trainor, 563 F.2d at 875.

other words, "[a]s for the state, our decision means only that if an [administrative] appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant." Id. at 878. Moreover, the Court of Appeals specifically reversed those portions of the Order which implied an adjudication of liability; the extensive quotations from the Order at p.6 of the Petition for Certiorari are therefore no longer involved in the case, a fact petitioner neglects to mention. Petitioner's attempt to assert that his liability has been adjudicated is belied by the Court of Appeals' reversal of the District Court Order insofar as it even implied such an adjudication.

REASONS FOR DENYING THE WRIT

I. THE EN BANC DECISION OF THE SEVENTH CIRCUIT IS CONSISTENT WITH THE EDELMAN DECISION.

In Edelman v. Jordan, 415 U.S. 651 (1974), this Court upheld the principle that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. at 663. Repeatedly, this Court emphasized that the fatal defect in the judgment was that it imposed an "award of an accrued monetary liability" (Id. at 664), and that such relief was "in practical effect indistinguishable in many aspects from an award of damages against the state." (Id. at 668) In other words, insofar as the judgment was the equivalent of a debt or a liability against the state, it was within the scope of the historic immunity of states from suits in federal courts, as described in Monaco v. Mississippi, 292 U.S. 323-324 (1934):

> "'Hamilton in the Federalist, No. 81, made the following emphatic statement of the general principle of immunity: ...'[T]here is no color to pretend that the state government would by the adoption of that plan [the Constitution] be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligation of good faith ... To what purpose would it be to authorize suits against

states for the debts they owe: How could recoveries be enforced: It is evident it could not be done without waging war against the contracting state ...'" Edelman v. Jordan, 415 U.S. at 660 n.19.

The majority in Edelman recognized, however, that this historic immunity of the states, subsequently embodied in the Eleventh Amendment, was limited to a great extent by the decision in Ex Parte Young, 209 U.S. 123 (1908). Under that decision, federal courts, notwithstanding the Eleventh Amendment, were held to have jurisdiction to grant certain kinds of relief against state officials, and, since that decision, it has become commonplace for the federal courts to enter injunctions against state officials. But the majority concluded that the doctrine of Ex Parte Young, consistent with the Eleventh Amendment, did not embrace "a retroactive award which requires the payment of funds from the state treasury ..." Id. at 677. See generally, LeClerq, State Immunity and Federal Judicial Power - Retreat from National Supremacy, 27 U.Fla.L.Rev. 361 (1975).2/

In drawing the line between permissible relief against state officers under the Ex Parte Young doctrine and impermissible awards establishing liabilities against states, the majority emphasized the narrowness of its holding - it was limited to "the award actually made in this case, and not one which might have been differently tailored." Id. at 665. Further, the Court stated:

> "As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte Young will not in many instances be that between day and night." Id. at 667.

Obviously, the propriety of notice relief was neither presented to, nor considered by, this Court in Edelman, and therefore there is simply no "law of the case" relevant to the issue presented, contrary to the claim of the petitioner. (Pet. Br. at 9) Both the trial court and the en banc decision recognized that the notice relief is neither an award of direct monetary relief nor equitable restitution against the state. The relief does not

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2/ Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash.U.L.Q. 195.

establish a debt against the state nor an accrued monetary liability against the state. The federal court is not placed in the position of adjudicating any monetary liability of the state or enforcing a debt or damages against the state. Because the notice relief requires only the sending of notices, and is not an award of damages, it is enforceable by means of the contempt power of the federal courts to the degree - but only to the degree - that notice is not sent. See Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974), cert. denied, 419 U.S. 885 (1974). Thus the problems alluded to in Edelman (supra at 3) in enforcing judgments against states for debts or liabilities are not presented by notice relief.

In addition, any payments to the members of the plaintiff class would not be based on the judgment below. If the notices were sent, and administrative appeals taken, and then the public aid officials refused to make any payments, they would not be in contempt of the federal court judgment. The only remedy of the plaintiffs would be to file a complaint for administrative review in the state courts in accordance with Illinois law. Ill. Rev. Stat., ch. 23, §11-8.7.

For all of the above reasons, there can be little doubt that the notice relief, upheld by the en banc decision of the Seventh Circuit, is very different, factually and analytically, from the original award of retroactive benefits. See Fitzpatrick v. Bitzer, 407 U.S. 445, 459 (1976) (concurring opinion, Stevens J.). Precisely this distinction between notice relief and direct monetary benefits was upheld by this Court in its summary affirmance in Grubb v. Sterrett, 400 U.S. 922 (1971), aff'g, 315 F. Supp. 990 (N.D. Ill. 1970),[3/] and this decision was not overruled by Edelman. See Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973),

3/ The three-judge court in Grubb upheld the notice relief granted in that case with the following reasoning:

> "This court did not enter a money judgment against the State of Indiana. Rather, it remanded the claims of members of plaintiff class for retroactive payment of wrongfully withheld welfare assistance for determination by the Indiana DPW in accordance with its already-established procedures. This

[continued on page 6]

cert. denied, 421 U.S. 920 (1975); Morris v. Houston, 0-250-73 (W.D. Mich. Oct. 18, 1974) (discussed in Jordan v. Trainor, 405 F. Supp. 802, 806-07 (N.D. Ill. 1975).

Notice relief, moreover, is entirely consistent with the principles enunciated in Edelman. This relief properly shifts to the state administrative and judicial apparatus the burden of effectuating the rights of the plaintiffs, and in that way reinforces the notions of federalism embodied in the Eleventh Amendment. Further, notice relief promotes the principles of cooperative federalism inherent in the federal-state public assistance programs. Notice of the availability of possible relief through existing state remedies, where the state agency itself, and state courts, would be the sole arbiters of whether any monetary relief would be granted, respects the limited role of federal courts in our federalist system, and at the same time, provides state law remedies to redress violations of federal law and thereby insures governmental accountability. See Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U.Colo.L.Rev. 1, 55, 59-60 (1972); Baker, Federalism and The Eleventh Amendment, 48 U.Col.L.Rev. 139 (1977). In sum, the current decree represents simply a termination of a class action by notice to the class that they may have certain additional rights, but adjudication of those additional rights is now beyond the federal court's power. Far from being an extension of the federal court's power, the notice concedes the limits of such power.

3/[continued from page 5]

> Court did impose some specific additional requirements as to the procedure by which the Indiana DPW was to consider such appeals as may be taken. These procedural requirements were necessary under the facts and circumstances of this case in order to inform members of plaintiff's class of this decision and their rights and privileges thereunder. The imposition of these procedural requirements was within the broad remedial power of federal courts to grant supplemental relief which is necessary to give meaningful effect to their judgments and decrees. See, e.g., Sullivan v. Little Hunting Park, Inc., 90 S.Ct. 400, 405 (1969)." Grubb v. Sterrett, Civ. No. 69 F 3, Memorandum and Order (N.D. Ind. June 8, 1970) (Cummings, Grant, Eschbach) (Emphasis in original.)

Finally, the notice relief approved by the Seventh Circuit may be upheld on the bases of related but alternative rationales. The members of the plaintiff class in this case have never received notice of denial of benefits as required by due process, federal regulations, and state law. Accordingly, the notice relief falls squarely within the federal court's remedial power, consistent with the Eleventh Amendment, to grant prospective injunctive relief.

It cannot be denied that the members of the plaintiff class are entitled under the due process clause to written notice detailing the reasons supporting the department's denial of AABD benefits to which they claim they are entitled. Goldberg v. Kelly, 397 U.S. 254 (1970); Brooks v. Center Township, 485 F.2d 383 (7th Cir. 1973); Mothers and Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972); Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1974); Barnett v. Lindsay, 319 F. Supp. 610 (D. Utah 1970). Similarly, federal regulations require written notice of a denial of benefits, and also "the reasons for and specific regulations supporting such actions, and an explanation of the individual's right to request a hearing." 45 C.F.R. §206.10(a)(4); see 45 C.F.R. §205.10(a)(3). In addition, Illinois law (Ill. Rev. Stat., ch. 23, §11-2) requires public aid officials to perform their duties "in such manner as to secure for every recipient the aid and services to which he may be entitled." (Under federal regulations, the petitioner could make payments to the members of the plaintiff class without hearings, and receive federal financial participation. 45 C.F.R. §§205.10(a)(18) and 205.10(b)). Further, Illinois case law clearly establishes the requirement that public aid officials send written notice of a denial of benefits, and improper payment alone is insufficient to satisfy the notice requirements of state law. Isabell v. Dept. of Public Aid, 18 Ill. App.3d 868 (1st Dist. 1974); Mann v. Illinois Dept. of Public Aid, 31 Ill. App.2d 430 (1975). In summary, then,

the state public aid officials in this case, by failing to send the notices akin to those ordered by the Seventh Circuit, have violated, and continue to violate the plaintiffs' right under the due process clause, federal regulations, and under state law. The injunction of the district court therefore may be viewed as the traditional prospective injunction requiring state officials to conform their conduct to the requirements of federal law. E.g., Milliken v. Bradley, ___ U.S. __ 97 S.Ct. ___, 53 L.Ed.2d 745, 761-62 (1977).

II. THE EN BANC DECISION OF THE SEVENTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT, AND PRESENTS NO SIGNIFICANT ISSUE WARRANTING PLENARY REVIEW.

The petitioner in his brief (p.7) contends that the en banc decision of the Seventh Circuit is in conflict with Fanty v. Commonwealth of Pa., 551 F.2d 2 (3d Cir. 1977), pet. for cert. filed sub nom., Randle v. Beal. First, the petitioner misleads the Court by suggesting that the Third Circuit rejected "the reasoning adopted by the Seventh Circuit in its en banc opinion." (Pet. Br. at 7) The Fanty decision preceded the Seventh Circuit's en banc decision, and thus it did not, and could not have taken into account the Seventh Circuit's en banc decision. On the other hand, the en banc decision of the Seventh Circuit did review the Fanty decision, and noted that each of the three judges adopted differing views of the scope of the Eleventh Amendment bar. Only Judge Seitz concluded that notices ordered in that case were contrary to the teachings of Edelman. In his opinion, he stated that the essential tests for determining whether relief violated the Eleventh Amendment were whether the relief operated against the sovereign itself, and not merely against a state officer, and whether the relief was based upon a past breach of legal duty. Id. at 4. These tests, however, were not adopted in Edelman, and have in fact been rejected by the Court as the bases for determining what relief against state officers is consistent with the Eleventh Amendment. Milliken v. Bradley, ___ U.S. ___ , 97 S.Ct. ___, 53 L.Ed.2d 745, 761-62 (1977).

A second judge in Fanty, Judge Garth, in dicta, viewed the Eleventh Amendment question as "borderline," (551 F.2d at 6) and then proceeded to hold that the case should have been dismissed because there was no case or controversy. A third opinion, written by dissenting Judge James Hunter III, concluded that the notice relief granted by the trial court did not violate the Eleventh Amendment. In sum, it can hardly be said that the Third Circuit decision in Fanty is squarely in conflict with the en banc decision of the Seventh Circuit. On the contrary, two of the three judges in Fanty, as well as the trial court judge, appear to be closer to the Seventh Circuit's interpretation of the scope of the Eleventh Amendment bar.

No other Circuit has been confronted with the narrow Eleventh Amendment issue presented in the Petition. Based on this sparseness of law on the question presented by the petition in this case, it certainly appears premature for this Court to give plenary consideration once again to the contours of the Eleventh Amendment. Drawing the lines between Edelman and Ex Parte Young should be attended to, in the first instance by the lower federal courts, and only after a clear conflict between the Circuits presents itself, if in fact one does so develop, should this Court give plenary consideration to the Eleventh Amendment issues presented herein. The narrow issue presented by the petition hardly reaches the standard set forth in Supreme Court Rule 19.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, JOHN JORDAN, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondent's affidavit in support of this motion is not attached hereto, but will follow shortly. Respondent proceeded in forma pauperis in the district court and the Court of Appeals below, and, in addition, by this Court at an earlier stage of this litigation, Edelman v. Jordan, 415 U.S. 651 (1974). A copy of John Jordan's affidavit in the latter case is attached hereto.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

JOEL EDELMAN, Director of Illinois Department of Public Aid, and Successor to EDWARD WEAVER, Former Director of Public Aid, Petitioner,

vs.

JOHN JORDAN, et al., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

A F F I D A V I T

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, JOHN JORDAN, being first duly sworn, depose and say, in support of the motion for leave to proceed in forma pauperis and without payment of costs or fees and without printing:

1. I am the named respondent in the above case.

2. I presently receive Aid to the Disabled.

3. Because of my poverty, I am unable to pay the costs of said cause, or to give security for this cause.

4. I believe that I, and other members of the class, are entitled to the relief granted by the lower court in this cause.

5. This cause involves the rights of AABD recipients

in Illinois to secure AABD benefits wrongfully denied them.

JOHN JORDAN

Subscribed and sworn to before me this 16th day of May, A.D., 1973.

Lena Burrell
Care taker

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

PROOF OF SERVICE

SHELDON ROODMAN certifies that he is one of the attorneys for respondents in the above-entitled matter and that a copy of Respondents' Brief in Opposition to the Petition for a Writ of Certiorari was served on

William J. Scott
Attorney General
Attention, William Wenzel
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by depositing a copy of same in a mailbox with first-class postage prepaid this 5th day of January, 1978.

Sheldon Roodman

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Supreme Court, U. S.
FILED
JUN 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

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vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE PETITIONER

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IN THE

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JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE PETITIONER

OPINIONS BELOW

This case was previously before the United States Supreme Court on a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit as *Edelman* v. *Jordan*, 415 U.S. 651 (1974), reversing and remanding *Jordan* v. *Weaver*, 472 F. 2d 985 (7th Cir. 1973). On remand from this Court there have been three opinions below. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, is reported as *Jordan* v. *Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975). The opinion of a three-judge panel of the United States Court of Appeals for the Seventh Circuit is reported as *Jordan* v *Trainor*, 551 F. 2d 152 (7th Cir. 1977). On review before this Court is the *en banc* opinion of the United States Court of Appeals for the Seventh Circuit in *Jordan* v. *Trainor*, 563 F. 2d 873 (7th Cir. 1977).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its *en banc* opinion and judgment in this case on October 19, 1977. On December 12, 1977, state petitioner Arthur F. Quern, Director of the Illinois Department of Public Aid, filed a Petition for Writ of Certiorari which was granted by this Court on February 27, 1978. The jurisdiction of the Supreme Court of the United States to review this cause is conferred by 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

(See Supplement)

U.S. Const., Amend. XI;
45 C.F.R. § 206.10(a)(3).

QUESTIONS PRESENTED

1. Is the Eleventh Amendment to the United States Constitution a jurisdictional bar to the exercise of a federal court's equitable powers to award retrospective relief against a non-consenting sovereign state in the form of a class notice regarding entitlement to retroactive benefits?

2. Has the law of this case as established by the Supreme Court in *Edelman* been circumvented and eviscerated by the *en banc* order and judgment of the Court of Appeals?

STATEMENT OF THE CASE

On January 28, 1971 Respondent John Jordan filed an amended two count, class action Complaint in the United States District Court for the Northern District of Illinois against Harold O. Swank, Director of the Illinois Department of Public Aid, and Edward Barrett, Comptroller of Cook County, individually and in their official capacities. (A. 6) Alleging a cause of action under 42 U.S.C. § 1983, Plaintiff charged the defendant Illinois officials responsible for administering the State's Aid to the Aged, Blind and Disabled Program (hereinafter AABD), 42 U.S.C. §§ 1381 et seq.,[1] with violating the AABD statute and implementing regulations,[2] denying equal protection of the laws, and contravening the Illinois Public Aid Code, *Ill. Rev. Stat.*, Ch. 23, § 3-1.

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1. Congress repealed the AABD program by Pub. L. 92-603, October 30, 1972, and simultaneously added a new Title XVI to the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*, entitled Supplemental Security Income for the Aged, Blind and Disabled (SSI). Both the repealer and the new title took effect on January 1, 1974. For a discussion of the relevancy of these changes in the law to this case, see *infra*, Part II A.

2. The federal law at issue was 42 U.S.C. § 1382(a)(8) which mandated that AABD assistance be furnished "with reasonable promptness to all eligible individuals." The Department of Health, Education and Welfare promulgated regulations, effective July 1, 1968, which specified that action on applications for the aged and blind under AABD be taken within thirty days, and action on applications for the disabled under AABD be taken within 45 days (later amended to 60 days). HEW Handbook of Public Assistance Administration, Part IV, Section 2200(b)(3), (4); Section 2300(b)(3), (5). These regulations were formally codified on February 27, 1971 and appeared as 45 C.F.R. § 206.10 (a)(3). (See Supplement hereto)

Count I of the amended Complaint was brought on behalf of a class of "all persons in Illinois eligible for [AABD] who are required by defendants to wait longer than [applicable federal time limits] for a determination of eligibility and receipt of their first assistance check." Count I was based solely on a Supremacy clause claim that the defendants were enforcing state regulations inconsistent with federal statutory and regulatory law.

Count II of the amended Complaint alleged violations of the Equal Protection Clause of the Fourteenth Amendment and the Illinois Public Aid Code, *Ill. Rev. Stat.*, Ch. 23, § 3-1 (1971). This Count was brought on behalf of a class defined as "all applicants for AABD in Illinois who meet the eligibility requirements when they apply but are denied benefits for the intervening period from the date of application to the month in which their grant is authorized." (A. 12-13)

In a single prayer for relief for both Counts of the Complaint, Respondent sought, *inter alia*, a declaration of inconsistency between the state law and the federal statute and regulations, a permanent injunction to compel defendants to comply with the federal time standards in the future, and a permanent injunction "enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld." (A. 15)

On April 16, 1971 the late District Court Judge, Alexander J. Napoli, entered a preliminary injunction against the defendants which for the first time imposed a court

ordered obligation upon the State to process AABD applications in conformity with federal law and regulations. (A. 17) The preliminary injunctive relief secured by Respondent was based solely on Count I of the Complaint (A. 20)

Similarly class certification in the order of April 16th under Federal Rules of Civil Procedure, 23(a) and (b) was limited to the class defined in Count I. (A. 20)

On March 15, 1972, the District Court entered a permanent injunction and Final judgment against the state officials[3] in their official capacities. (A. 23) No relief was entered against any of the state officials in their individual capacities, the Court expressly denying an award of punitive damages against defendant Swank. Paragraphs 1-4 of the Judgment Order (A. 24-25) constituted declaratory and prospective injunctive relief on behalf of the previously certified Count I Class of AABD applicants based upon a Supremacy Clause violation. Paragraphs 5 and 6 of the judgment ordered defendant Weaver "to release and remit AABD benefits wrongfully withheld to all applicants for AABD in the State of Illinois who applied between July 1, 1968 [the date of the federal regulations] and April 16, 197[1] [the date of the preliminary injunction] and were determined eligible . . ." (A. 25-26)[4]

On the State's Appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the Eleventh Amendment did not bar the exercise of the Court's equitable

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3. Prior to March 15, 1972, Edward T. Weaver had succeeded Harold O. Swank as Director of the Illinois Department of Public Aid and therefore the Judgment Order operated against defendant Weaver. (A. 23)

4. The relief in paragraphs 5 and 6 of the Judgment was entered on behalf of a non-certified Count II class on the basis of a Count I violation.

powers to award retroactive benefits against the State, and in the alternative, that Illinois had constructively consented to suit by participating in the federal AABD plan. *Jordan* v. *Weaver,* 472 F. 2d 985 (7th Cir. 1973). The United States Supreme Court granted certiorari on the issue of whether the Eleventh Amendment barred retroactive benefits.

In reversing the ruling of the Seventh Circuit, *Edelman* v. *Jordan,* 415 U.S. 651 (1974)[5], the United States Supreme Court in a landmark decision unambiguously held that the Eleventh Amendment constitutes a jurisdictional bar to the exercise of federal judicial power and that:

> ". . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, Ex Parte Young, *supra,* and may not include a retroactive award which requires payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*" 415 U.S. at 677.

Despite this ruling by the nation's highest court, Respondent, on remand before the Seventh Circuit, sought to evade the bar of the Eleventh Amendment by seeking, *inter alia,* an identical order of equitable restitution based on the Fourteenth Amendment, and an order directing the District Court to enter a declaratory judgment that members of the Count II class were illegally deprived of AABD assistance and are entitled to restitution. This subterfuge was unavailing and the Court of Appeals reversed the award of retroactive benefits and remanded

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5. Joel Edelman succeeded Edward T. Weaver as Director of the Illinois Department of Public Aid effective February 13, 1973.

the cause to the District Court with instructions to modify its judgment in accordance with the decision in *Edelman.* (A. 29)

Respondent, in yet another maneuver to undo the ruling of this Court, successfully petitioned the District Court (A. 31) to require the Defendant, James L. Trainor[6] to send a written notice entitled "Notice of Right to Appeal Denial of Benefits" (A. 54) to each AABD applicant whose application was delayed in processing during the period between July 1, 1968 and April 16, 1971, the date of the preliminary injunction. The notice set forth the amount of public assistance "to which you were entitled" for the particular person to whom the notice was ordered sent. The Court further required the state officials to enclose, to each person being notified, a notice of appeal "challenging the denial of benefits." By its terms the notice of appeal set forth the following language as grounds for appeal: "The Department illegally delayed in the processing of my A.B.B.D. application and as a consequence denied me benefits to which I am entitled." (A. 55) The District Court's decision is reported as *Jordan* v. *Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975), (A. 40).

Petitioner appealed this decision to the United States Court of Appeals for the Seventh Circuit, and a three-judge panel of that Court unanimously reversed the order of the District Court and held that the Eleventh Amend-

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6. James L. Trainor succeeded Joel Edelman as Director of the Illinois Department of Public Aid on August 14, 1974. Due to a change in Illinois law which merged the Cook County Department of Public Aid into the Illinois Department of Public Aid effective January 1, 1974, the only official defendant left in the case as of that date, was the state defendant. See *Ill. Rev. Stat.,* Ch. 23, § 12-18.1

ment constituted a bar to the trial court's order requiring such notice. The panel further found that the order attempted to accomplish by indirection an end prohibited by this Court in *Edelman. Jordan* v. *Trainor,* 551 F. 2d 152 (7th Cir. 1977), (A. 57).

The Court of Appeals granted Respondent's petition for a rehearing *en banc* and in a majority decision, three judges dissenting, held that a retrospective order requiring a non-consenting state to send a notice regarding retroactive benefits to members of the Count II class is constitutionaly permissible under the Eleventh Amendment and does not circumvent the law of the case as established by this Court in *Edelman. Jordan* v. *Trainor,* 563 F. 2d 873 (7th Cir. 1977) (*En Banc*) (A. 64).

SUMMARY OF ARGUMENT

I.

The *en banc* decision of the Court of Appeals violates the law of the case as established by this Court in *Edelman* v. *Jordan,* 415 U.S. 651 (1974).

The rule of the law of the case requires a lower federal court to obey the decisions of a superior court, and to refuse to permit relitigation of matters or issues previously decided.

The law of this case is the substantive ruling of this Court in *Edelman,* that the federal courts under the Eleventh Amendment lack jurisdictional power to order payment of retroactive welfare benefits which are payable out of a state's treasury without the state's consent.

Respondent's only purpose in pursuing the Motion to Require Notice to class members is ultimately to collect retroactive money benefits from the state treasury for a past breach of a legal duty. This Court has said that the federal courts lack jurisdiction to order such relief against a nonconsenting state. If the lower courts lack jurisdiction to award relief directly, they may not accomplish the same end by indirection.

The *en banc* decision disregards the law of the case, and without any intervening changes in law or fact, permits the Respondent to relitigate the issue of retroactive damages under another name.

The District Court not only disregarded the law of this case as laid down by this Court, but also violated the mandate of this Court as passed down to it by the Court of Appeals.

This Court in *Edelman* reversed the judgment of the Court of Appeals, which had upheld the order of the District Court for payment of retroactive benefits, and remanded the cause for further proceeding consistent with this Court's opinion. Some seven months later the Court of Appeals remanded the case to the District Court, saying that pursuant to the mandate of the Supreme Court, the District Court's award of retroactive benefits to plaintiffs was reversed.

It has long and consistently been held by this Court that an inferior court may not deviate from an appellate court mandate. It can not give any other or further relief than provided in the mandate.

The Court of Appeals *en banc* participated in and condoned the evasion of the mandate of this Court by approving other and further retroactive relief. In holding that some form of notice was permissible, although not the exact form ordered by the District Court, the Court of Appeals trangressed the limits to federal judicial power under the Eleventh Amendment as construed by this Court.

II.

The Eleventh Amendment is a jurisdictional bar to the exercise of a federal court's equitable power to order retrospective notice relief against a nonconsenting state.

Edelman reaffirmed the principle that the Eleventh Amendment is a jurisdictional limitation upon federal judicial power. The jurisdictional limitation is applicable regardless of the nature of the relief sought. It may not be avoided by characterizing the relief as a "mere explanatory notice", when the end result will be the same: payment of money out of the treasury of a nonconsenting state for a past breach of a duty. The lower courts have exceeded their jurisdiction in granting any type of relief pertaining to retroactive benefits.

The remedial power of the federal courts consistent with the Eleventh Amendment is necessarily limited to prospective injunctive relief. The Court of Appeals evades the ruling of this Court by creating a form of notice intended to be Eleventh Amendment proof, by calling it an adjunct to the purely prospective relief granted in 1972, and by purporting not to create a liability against the State.

The relief Respondent seeks, no matter how provided for, or whatever it is called, is to collect money, admittedly to be paid by the State of Illinois, for breach of a duty from 1968 to 1971. It can by no stretch of the imagination be called prospective injunctive relief or any adjunct to it. It is aimed solely at collecting retroactive benefits from the State barred by *Edelman*.

The event dividing past from prospective for purposes of the Eleventh Amendment is the entry of a court order or judgment requiring a party to conform his conduct to a different standard. The relief sought by Respondent concerning conduct prior to the date of the preliminary injunction is clearly not prospective and is therefore barred by the Eleventh Amendment.

The *Edelman* Court expressly disapproved of compensatory relief. Notice relief in any form under the circumstances of this case is essentially compensatory because past state denial of AABD assistance is wholly unconnected to present Illinois compliance with federal time standards for application processing. There is no link between notice relief in 1978 and an individual's 1968 need for financial assistance. Indeed, notice relief may very well compensate by retroactive payments persons no longer on the welfare rolls. Moreover, even if a person to whom notice were directed is presently on welfare, it is implausible that the withholding of assistance in 1968 coincides with a present need for assistance.

There is no post-*Edelman* authority which supports the notice relief envisioned by the *en banc* order. The Third Circuit Court of Appeals in a welfare case nearly on all fours with this case has ruled that notice relief regarding past wrongdoing is precluded by this Court's decision in *Edelman* and by the Eleventh Amendment.

ARGUMENT

I.

THE *EN BANC* DECISION VIOLATES THE LAW OF THIS CASE AS ESTABLISHED BY THE UNITED STATES SUPREME COURT IN *EDELMAN* v. *JORDAN*.

A.

The Law Of This Case Is That The Eleventh Amendment Bars The Federal Courts From Giving Respondent Any Form Of Relief Against The State Regarding Or Affecting Retroactive Welfare Benefits.

In its *en banc* order and opinion of October 19, 1977, the Court of Appeals ignored the rule of the law of the case. This rule, based upon sound policy, requires an inferior court to obey the decisions of an appellate court and to refuse to permit the relitigation of matters previously decided.

This Court in *Insurance Group Committee* v. *Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947) formulated the rule in the following manner:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.

Such a doctrine is necessary for "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *Roberts* v. *Cooper*, 20 How. [61 U.S.] 467, 481 (1857).

The law of this case is the substantive ruling by the United States Supreme Court in *Edelman* v. *Jordan*, 415 U.S. 651 (1974) which is controlling on any and all subsequest stages of the case unless vacated or reversed by this Court. The Supreme Court ruled, and the law of the case is, that a federal court lacks jurisdictional power to hear, and Respondent may not litigate consistent with the Eleventh Amendment, issues arising out of the past conduct of a state and secure a mandatory order regarding or affecting retroactive welfare benefits without the state's consent.

Respondent's motion in the District Court on remand represents a scandalous and brazen effort to subvert the decision of the United States Supreme Court and to secure by indirection that which is forbidden directly. The *en banc* ruling of the United States Court of Appeals, in disregard of the law of the case and without any intervening changes in fact or law to justify its conclusion, permits Respondent to relitigate the issue of retroactive damages under the Eleventh Amendment and to secure, by indirection, payment of those same benefits from the state treasury.

If a suit by Respondent seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment under this Court's ruling in *Edelman*, then a lower court is precluded, absent "unusual circumstances", from ordering any relief in the same case which is intended for the same purposes. Respondent's obvious purpose in filing his Motion to Require Notice is to utimately collect retroactive benefit payments

from the state treasury. If the District Court lacks jurisdiction to order relief against a nonconsenting state "measured in terms of a monetary loss resulting from a past breach of a legal duty", *Edelman,* 415 U.S. at 668, then any relief, including notice relief, measured in the same terms and designed to secure retroactive payments is likewise barred.

Judge Pell, in his dissenting opinion in *Jordan* v. *Trainor,* 563 F. 2d 873, 878 (7th Cir. 1977) deplored the artful evasion of the law of the case which the Respondent has perpetrated and in which the Court of Appeals acquiesced. By Judge Pell's analysis there can be no constitutionally inoffensive form of notice regarding retroactive welfare benefits consistent with this Court's decision:

> Notwithstanding laundering efforts in this court, the refined order outlined in the *en banc* majority opinion will still, upon any realistic analysis, result in a situation which 'is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials'.

Since the result, in any practical sense, is indistinguishable from an imposition of a liability, Judge Pell believed that the rule of the law of the case had been violated:

> [t]he constitutionally designated "inferior courts" who have vested in them the "judicial Power of the United States," should, in the orderly exercise of that vested power, refrain from attempting, no matter how artfully done, to accomplish by indirection that which has been specifically prohibited, particularly in the very litigation in which the prohibition was proclaimed. 563 F. 2d at 878.

Petitioner respectfully submits that this Court should likewise conclude that the *en banc* order of the Court of Appeals constitutes reversible error as a violation of the law of this case as established by the ruling in *Edelman.*

B.

The District Court Violated The Mandate Of This Court As Passed Down By The Court Of Appeals.

The majority opinion of this Court in *Edelman* v. *Jordan, supra,* at p. 678, ended as follows:

> For the foregoing reasons we decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payments of benefits found to have been wrongfully withheld. The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

On October 29, 1974, the Court of Appeals issued its mandate to the District Court. It read as follows:

> On March 25, 1974, the Supreme Court entered a judgment reversing this Court's judgment in this appeal (see 472 F. 2d 985) and remanding for further proceeding consistent with its opinion. See 415 U.S. 651. Further briefs were filed and considered in this Court after the remand.
>
> Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below with instructions to modify its judgment as necessary in order to insure that entitlement need not attach to applicants in Illinois any earlier than required by the version of 45 C.F.R. § 206.10 in force on the date of application. Thus in accord with a recent amendment to 45 C.F.R. § 206.10(a)(3), entitlement shall not be required to attach to applicants for aged and blind benefits who apply after October 15, 1973, until 45 days after the date of application, rather than the 30 days provided for in the court below.

Costs to be borne by the respective parties. (A. 29-30).

The instructions for modification of the judgment pertaining to time requirements in Federal Regulations are not relevant to this present proceeding. They were required because of the changes in 45 C.F.R. § 206.10 after the filing of the case and after the original District Court injunction by Judge Napoli in 1971. See *Edelman* v. *Jordan*, 451 U.S. at 654, n. 3.

The mandate of the Court of Appeals is clear. Omitting the language required by the amendment of the pertinent Federal Regulation, it reads simply:

> Pursuant to the mandate of the Supreme Court, it is ordered that the district court's award of retroactive benefit payments to plaintiffs is reversed and the cause is remanded to the court below . . .

The District Court therefore had no right to consider the question of notice raised by the Respondent for the first time on remand. It is not just a question of whether a particular form of notice may be constitutionally inoffensive as the Seventh Circuit suggests. 563 F 2d at 875. The District Court had no right to consider the question of notice in any form. Consideration of this issue was foreclosed by the law of this case, the mandate of this Court, and the mandate of the Court of Appeals. And if the District Court had no right to open up the question of notice, then it was of course not properly before the Court of Appeals when Petitioner appealed the District Court ruling.

This Court has long and consistently held that an inferior court may not deviate from an appellate court mandate.

In *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948), the Court noted:

> In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Himely* v. *Rose*, 5 Cranch 313, 3 L. Ed. 111; *The Santa Maria*, 10 Wheat. 431, 6 L. Ed. 359; *Boyce's Executors* v. *Grundy*, 9 Pet. 275, 9 L. Ed. 127; *Ex parte Sibald* v. *United States*, 12 Pet. 488, 9 L. Ed. 1167. The rule of these cases has been uniformly followed in later days; see, for example, *In re Washington & Georgetown R. Co.*, 140 U.S. 91, 11 S. Ct. 673, 35 L. Ed. 339; *Ex parte Union Steamboat Company*, 178 U.S. 317, 20 S. Ct. 904, 44 L. Ed. 1084; *Kansas City Southern R. Co.* v. *Guardian Trust Co.*, 281 U.S. 1, 50 S. Ct. 194, 74 L. Ed. 659.

It has been stated that the trial court "is without power to do anything which is contrary to *either the letter or spirit* of the mandate construed in the light of the opinion of (the) court deciding the case." *City of Cleveland, Ohio* v. *Federal Power Commission*, 561 F. 2d 344, 346 (D.C. Cir. 1977), citing *Yablonski* v. *United Mine Workers*, 454 F. 2d 1036, 1039 (D.C. Cir. 1971), *cert. denied* 406 U.S. 906, *quoting Thornton* v. *Carter*, 109 F. 2d 316, 320 (8th Cir. 1940). (emphasis supplied)

A similar situation, involving the same District Court Judge who initially approved Respondent's notice relief herein, was recently presented to this Court in *Vendo Co.* v. *Lektro Vend Corp.*, —— U.S. ——, 98 S. Ct. 702 (1978). In *Vendo Co.*, the Honorable Hubert L. Will had issued an injunction against enforcement of a state court judgment based upon a violation of an anticompetition agreement. 403 F. Supp. 527 (N.D. Ill. 1977). The Court of Appeals for the Seventh Circuit affirmed, 545 F. 2d 1050 (1977), and the Supreme Court, on certiorari, reversed, —U.S. —, 97 S. Ct. 2881 (1977). In reversing this Court ordered "that this cause be, and the same is hereby, remanded to the

United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court". See, 98 S. Ct. 703.

On August 19, 1977, the Court of Appeals in turn entered an order remanding the case to the District Court "for further proceedings in conformity with the opinion of the United States Supreme Court rendered on June 29, 1977". See, 98 S. Ct. at 703.

On remand, Judge Will failed to dissolve the injunction as required by the judgment of this Court which led to Petitioner Vendo Co. filing a motion for clarification of the mandate of this Court. Treating Petitioner's motion as a motion for a clarification of judgment, 98 S. Ct. 702, this Court denied it without prejudice to filing a petition for a writ of mandamus in the Supreme Court. Quoting *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255 (1895) this Court stated:

> "[w]hen a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate."

The passage cited from *In re Sanford Fork and Tool Co.* continues in the original with additional observations appropriate to this case:

> [The Circuit Court on remand] cannot vary [the mandate], or examine it for any other purpose than execution; *or give any other or further relief;* or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . ." 160 U. S. at 255 (emphasis added)

The fact that Petitioner in this case proceeded by appeal from the District Court to the Court of Appeals, instead of seeking mandamus, makes no difference in the general principle of law, for the quotation from *In re Sanford Fork and Tool Co.* concludes:

> If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate of this court. 160 U. S. at 255.

In the instant case both the District Court and the Court of Appeals (*en banc*) have participated in and condoned Respondent's evasion of the mandate of this court by granting "further relief . . . upon [a] matter decided upon appeal". Such intermeddling with the mandate of this Court in *Edelman* is doubly objectionable. First the effect of the *en banc* ruling is to circumvent and eviscerate the mandate of this Court. Second, and perhaps more important, the Seventh Circuit's order trangresses the limits to federal judicial power set by the Eleventh Amendment thereby undermining the principle of federalism and dual sovereignty inherent in the Constitution. See, Part II, *infra.*

II.

THE ELEVENTH AMENDMENT IS A JURISDICTIONAL BAR TO THE EXERCISE OF A FEDERAL COURT'S EQUITABLE POWER TO ORDER RETROSPECTIVE NOTICE RELIEF AGAINST A NONCONSENTING STATE.

A.

Edelman v. *Jordan* Reaffirmed That The Eleventh Amendment is a Jurisdictional Limitation Upon Federal Judicial Power.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In interpreting these forty-three words since the Amendment's ratification in 1798, the Supreme Court has often given heed to the notion expressed by Chief Justice Hughes in *Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934):

> Manifestly, we cannot rest with a mere literal applicatoin of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of constitutional provisions are postulates which limit and control . . .

The Seventh Circuit Court of Appeals in *Jordan* v. *Weaver*, 472 F. 2d 985 (7th Cir. 1973) ignored Justice Hughes' heeding when it held that the Eleventh Amendment did not bar the exercise of a federal court's equitable power to award retroactive benefits under the label of restitution against the State of Illinois.

In reversing and remanding the ruling of the Seventh Circuit in *Edelman* v. *Jordan, supra,* this Court held:

> [W]e decide that the Court of Appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payments of benefits found to have been wrongfully withheld. 415 U. S. at 678.

This holding was predicated upon this Court's reaffirmation of the principle that the Eleventh Amendment defense constitutes a *jurisdictional bar* which effectively limits and controls the scope of federal judicial power. The words of the Supreme Court were characteristic, 415 U. S. at 677-678:

> We approve of this resolution, since it has been well-settled since the decision in *Ford Motor Co.* v. *Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court:
>
> "[The Attorney General of Indiana] appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits. The objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. *The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power* of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." 323 U.S. at 466-467. (Emphasis Added).

Edelman teaches that the Eleventh Amendment's jurisdictional character is applicable regardless of the nature of the relief sought. Respondent had argued before this Court in *Edelman* that under the doctrine of *Ex Parte Young,* 209 U. S. 123 (1908) "the Director is stripped in all

respects of his official position when acting in violation of the law, and, accordingly, the federal court may grant whatever equitable relief is appropriate under the circumstances. Moreover, the immunity of a state under the Eleventh Amendment is from a "suit" in federal court and not from certain types of equitable relief." Respondent's Brief, p. 10, in *Edelman*. This Court's holding refuted that contention.

Despite the clear ruling of this Court that the Amendment erects a jurisdictional bar to all forms of relief against a state, Respondent on remand before the Seventh Circuit Court of Appeals, styling himself an "appellant" (as if he were appealing this Court's decision to the Seventh Circuit), filed a 45 page brief in which he reargued the contention that the Fourteenth Amendment worked a repeal of the Eleventh Amendment and requested relief in the form of a Declaratory Judgment that Respondent and the class he represented were illegally denied assistance, and were entitled to restitution.[7]

While the Court of Appeals did not specifically address itself to Respondent's contentions, it nevertheless did not grant declaratory relief with respect to retroactive benefits. (A. 9) An explicit denial of declaratory relief in the face of the Eleventh Amendment would have been the proper course of action for the Court since the Amendment by its terms extends to "any suit in law or equity" leaving no room for the contention that mere declaratory relief escapes the sweep of the constitutional prohibition. Despite

7. The contention that the Fourteenth Amendment worked a repeal of the Eleventh Amendment had been presented in detail to this Court in *Edelman* in the amicus brief of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and in Respondent's Petition for a Rehearing.

silent recognition then of the force of the Eleventh Amendment, some three years later the same Court of Appeals, in the same case and against the vigorous reassertion of the Eleventh Amendment by the state, approved equitable relief in the form of a "mere explanatory notice," 563 F. 2d at 875, to a non-certified, class of recipients of AABD explaining that government inaction seven to ten years ago may now entitle them to monetary payments to meet their past needs[8].

In so ruling the Court of Appeals (*en banc*) disregarded a pertinent observation by the panel decision of the court, *Jordan* v. *Trainor*, 551 F. 2d 152, 153-154 (7th Cir. 1977) (A. 21):

> The Supreme Court in *Edelman* . . . makes it very clear that *the Eleventh Amendment is in substance a juris-*

8. As stated *supra*, p. 4, there no longer exists an AABD program. Pursuant to § 212 of Pub. L. 93-66, as amended by Pub. L. 93-233, § 10, December 31, 1973, 87 Stat. 957; Pub. L. 93-335, § 2(a), July 8, 1974, 88 Stat. 291, Congress required mandatory state supplementation of SSI benefit payments for the benefit of all persons who for the month of December, 1973 were recipients of AABD and whose AABD payment level was greater than the payment level under SSI. In addition the new title XVI of the Act, § 1616, 42 U.S.C. § 1382e allowed for optional state supplementation of SSI benefits to SSI recipients who were not beneficiaries of the aforementioned "grandfather" provision. Both the mandatory and optional state supplementation programs are presently in effect in Illinois, are administered under the Illinois Public Aid Code, Ill. Rev. Stat., Ch. 23, §§ 3-1 et seq., and are wholly state funded. The import of these changes in the law since the filing of this lawsuit in 1971 is that Illinois is uncertain of its right, if any, to seek federal financial participation with respect to any retroactive AABD benefits which may be paid as a result of Respondent's Motion for Notice Relief.

> *dictional bar to the exercise of federal judicial power concerning past action or inaction of a state* with respect to the Aid to the Aged, Blind, or Disabled Program. The granting of any type of relief constituting entitlement to retroactive benefits claimed against the state is therefore precluded in this case. (Emphasis added)

As the State of Illinois has not and does not consent to litigate before a federal tribunal the issue of Respondent's entitlement to some form of relief to remedy past action or inaction of the state under AABD, the District Court and the Court of Appeals (*en banc*) exceeded their jurisdiction in granting any type of relief regarding or affecting retroactive benefits.

B.

A Federal Court's Remedial Power Consistent With The Eleventh Amendment Is Necessarily Limited To Prospective Injunctive Relief.

This suit was originally filed as a claim for violation of Respondent's civil rights under 42 U.S.C. § 1983. The notice which the District Court ordered to be sent, as well as the modified version described by the Court of Appeals (*en banc*), is designed to *remedy* the denial of assistance payments arising out of past conduct of state officials. The Supreme Court in *Edelman* has delimited the scope of a federal court's remedial power under a § 1983 action:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is *necessarily limited to prospective injunctive* relief, *Ex Parte Young, supra,* and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.* 415 U.S., at 677. (Emphasis added)

The order of the District Court, *Jordan* v. *Trainor,* 405 F. Supp. 802 (N.D. Ill. 1975), (A. 12), is labeled an "Injunction" and purports to enjoin James L. Trainor, then Director of the Illinois Department of Public Aid, to notify over 20,000 members of a non-certified class of the denial of assistance benefits and of the right to appeal the denial of benefits, and, to provide the members of the class who appeal an opportunity to secure those benefits from the state treasury.

To achieve its desired end the District Court on remand reasoned that Edelman permits only "prospective" injunctive relief, 405 F. Supp. at 804, (A. 3), and then proceeded to state that "The relief now requested by plaintiffs is neither one for retroactive monetary relief nor an injunction requiring the state to conform its conduct in the future to a set of standards." *Ibid.* Thus seemingly freed from the constraints of *Edelman,* the District Court declared that the Eleventh Amendment "has never been held to prohibit federal courts from fashioning other appropriate relief in suits in law or in equity between citizens of a state and officials of the same state", 405 F. Supp. at 805, (A. 5). This statement is inaccurate and overlooks, with respect to citizens of the same state, the case of *North Carolina* v. *Temple,* 134 U.S. 22 (1890) (bill in equity to require a state auditor to levy and collect certain taxes), and ignores the *Edelman* Court's specific mention of *Hagood* v. *Southern,* 117 U.S. 52 (1886) and *In re Ayers,* 123 U. S. 443 (1887), "both actions against state officers for specific performance of a contract," 415 U. S. at 666. None of these cases was overruled by *Ex Parte Young, supra,* and they "demonstrate that equitable relief may be barred by the Eleventh Amendment." 415 U. S. at 666.

The District Court cited three recent cases which it contended support its conclusion that notice relief concerning

retroactive welfare benefits is not barred by the Eleventh Amendment. *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *sum. affd.,* 400 U.S. 922 (1971); *Doe* v. *Gillman,* 479 F. 2d 646 (8th Cir. 1973), *cert. denied,* 421 U.S. 920 (1975); and *Morris* v. *Houston,* — F. Supp. — (unreported decision, No. 0-25073-C.A., W.D. Mich. October 18, 1974) *reversed* by order of the 6th Cir. as a result of the decision in *Burns* v. *Alcala,* 420 U.S. 575 (1975). Neither *Grubb* nor *Gillman* has any precedential value for the issue here, as both were decided before *Edelman* and neither dealt with the issue of Eleventh Amendment immunity.

Morris v. *Houston, supra,* is clearly distinguishable. *Morris* did not stand for the proposition that a federal court has the power to require a nonconsenting state to send a notice to a non-certified class of plaintiffs regarding benefits withheld *prior* to either the filing of the lawsuit or the granting of preliminary injunctive relief. Two sub-classes of Aid to Families with Dependent Children (AFDC) recipients had been defined and certified in *Morris*: those individuals who applied for AFDC assistance for unborn children between the filing of the Complaint, and the date of the preliminary injunction; and those individuals who applied for assistance after the date of the court's preliminary injunction. Injunctive relief, on behalf of the first subclass, granted prior to the decision in *Edelman*, was dissolved by the court as there was no further need for relief. The court ordered notice sent only to the second sub-class. This aspect of the *Morris* order was clearly an example of permissible prospective injunctive relief or an adjunct thereto. *Morris* was no authority for the retroactive notice relief which the District Court ordered in the instant case or the relief envisaged by the Seventh Circuit.

The panel decision of the Court of Appeals, *Jordan* v. *Trainor,* 551 F. 2d 152 (7th Cir. 1977), (A. 18) did not

accept the District Court's reasoning that the notice relief Respondent requested was consistent with the Eleventh Amendment. Judge Whelan reiterated the ruling of this Court that only prospective injunctive relief is permissible consistent with the Eleventh Amendment, 551 F. 2d at 154, and notes correctly that the constitutional provision limits "federal judicial power concerning past action or inaction of a state," 551 F. 2d at 155. The Court equated the notice to be sent with an admission by the state that it is liable for retroactive benefits and concluded that the notice constitutes forbidden relief which will order, in effect, the payment of state funds by retroactive award for past action or inaction by the state.

The *en banc* decision of the Court of Appeals, while rejecting the District Court's version of a notice, envisions a form of notice which would be Eleventh Amendment "proof": it would be simply an "adjunct to the purely prospective relief" granted in 1972 to the Count I class, 563 F. 2d at 875, and it would not create a liability against the state, *Ibid.* at 876.

There are several things wrong with this analysis. First, prospective injunctive relief, under *Ex Parte Young, supra,* is in the words of this Court, designed to effect "compliance in the future with a substantive federal-question determination." 415 U.S. at 668. Specifically this Court approved as prospective injunctive relief that portion of the original District Court's judgment order which required the state official to conform his AABD application determination process to the confines of the standards imposed by the applicable federal regulations issued by HEW. It is difficult to understand how notice relief regarding state inaction during a period of time from 1968 to April 16, 1971 (the date of the District Court's preliminary injunction) and possible entitlement to back benefits can be fairly char-

acterized as an "adjunct to the purely prospective relief granted." Petitioner submits that, for purposes of the Eleventh Amendment, both the "class" of recipients seeking relief and the relief itself are "retroactive" in that they are defined in terms of a period of time when the Director of the Illinois Department of Public Aid was under no court-imposed obligation to conform his application-processing procedures to a different standard.

If it is to be argued, as the Court of Appeals seemingly does, that notice relief is an adjunct to prospective relief, then what is the standard or law that *Petitioner* is presently violating which requires that his conduct be constained to conform to a different standard?[9]

Second, the relief, as noted in Judge Pell's dissent "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of defendant state officials" and will assuredly lead to payment of state funds from the state treasury and will not be satisfied from the funds of Petitioner Quern or any of his predecessors.

Finally, the relief concedely runs against the State of Illinois and not Petitioner, 563 F. 2d at 875, and is therefore impermissible under either *Ex Parte Young* or *Edelman* in the face of an assertion of the Eleventh Amendment as a defense.

---

9. Respondent argued below that Petitioner is violating his due process obligation to notify respondent and the retroactive class members of the state's past denial of benefits. The Court of Appeals (*en banc*) did not even dignify this contention by taking note of it. This was appropriate as Respondent's Complaint (A. 6) is devoid of any due process claim and the first time this claim surfaced was in Respondent's Brief in the Seventh Circuit in response to the same question posed here.

It is respectfully submitted that no form of notice relief concerning retroactive benefits is permissible under this Court's ruling in *Edelman* or consistent with the bar of the Eleventh Amendment. While the substance of the relief sought is an important factor it is not controlling. What should be considered is whether the relief seeks to effect a retroactive enforcement of a right, nominally against a state official, but in essence against a sovereign state, with respect to a period of time when the state official "was under no court-imposed obligation to conform to a different standard." 415 U.S. 668. The notice envisaged by the Court of Appeals (*en banc*), in Judge Tone's dissenting opinion, is relief "aimed solely at retroactive enforcement" of Respondent's rights against the state, and thus barred by *Edelman*. 563 F. 2d at 878.

C.

The Event Dividing Past From Prospective For Purposes Of The Eleventh Amendment Is The Entry Of A Court Order Or Judgment Requiring A Party To Conform To A Different Standard.

The Supreme Court reversed the order awarding benefits in this case for members of the Count II class, defined as those who were denied assistance between July 1, 1968 and April 16, 1971, because the order was not prospective. It was not prospective because it required the payment of state funds:

> "... not as a necessary consequence of complying with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule *at a time when petitioner was under no court-imposed obligation to conform to a different standard.*" 415 U.S., at 668. (Emphasis Added)

Twice prior to its notice ruling in *Jordan,* the Seventh Circuit was confronted with the question of permissible equitable relief consistent with the Eleventh Amendment subsequent to the *Edelman* decision. *Vargas* v. *Trainor,* 508 F. 2d 485 (7th Cir. 1974), *cert. denied,* 420 U.S. 1008 (1974); *Townsend* v. *Edelman,* 518 F. 2d. 116 (7th Cir. 1975).

In both *Vargas* and *Townsend* the Seventh Circuit rejected attempts by welfare recipients to circumvent the prospectivity limitation of *Edelman* and to secure retroactive benefits. In reaching its conclusion the Court was required to determine where to draw the line between permissible relief and relief precluded by the Constitution.

The Court concluded that the event dividing past from prospective is the "entry of a court order or judgment requiring that payments be made." *Vargas* v. *Trainor, supra* at 485; *Townsend* v. *Edelman, supra* at 120, n. 8. If the Court of Appeals (*en banc*) had applied these prior rulings to the notice issue before it, it could only have concluded that the District Court's entry of preliminary injunctive relief on April 16, 1971, (A. 17), divided the past from the future for Eleventh Amendment purposes.

This Court in *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976) seems to place the line of demarcation at "the entry of [a court's] determination of . . . wrongfulness," 96 S. Ct. at 2669.

In either case the relief sought by Respondent concerning conduct prior to the date of the preliminary injunction is clearly not prospective and is therefore barred by the Eleventh Amendment.

D.

Notice Relief In Any Form Constitutes Compensation For Past State Inaction In This Case.

The *en banc* opinion narrowly construes the significance of the Eleventh Amendment and *Edelman* to relief which in substance creates or imposes a liability upon a nonconsenting state. In the Court's opinion, a mere explanatory notice would not create or impose any monetary liability and any liability which ultimately results will be due to a state determination, not a federal one. This reasoning is faulty for two reasons: one, it does not accurately describe the chain of causation between the exercise of federal court power and the ultimate payment of state monies for retroactive benefits; second, it fails to acknowledge the essentially compensatory nature of notice relief under the circumstances of this case.

The *Edelman* Court expressly disapproved of equitable restitution because "It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination but as a form of compensation", 415 U.S. at 668. Compensatory relief is relief which makes reparations for the past, whether directly or indirectly. The Eleventh Amendment bars compensatory relief which is directed at the state and which is not intended to remedy, in the future, official wrongdoing. *Cf., Miliken* v. *Bradley,* —— U.S. ——, 97 S. Ct. 2749 (1977).

Notice relief in any form under the circumstances of this case is essentially compensatory because past state denial of AABD assistance is wholly unconnected to present Illinois compliance with federal time standards for application processing. There is no link between notice relief in 1978 and an individual's 1968 need for financial assistance.

Indeed, notice relief may very well compensate by retroactive payments persons no longer on the welfare rolls. Moreover, even if a person to whom notice were directed is presently on welfare, it is implausible that the withholding of assistance in 1968 coincides with a present need for assistance.

As this Court noted (citing with approval Judge McGowan's analysis in *Rothstein* v. *Wyman,* 467 F. 2d 226, 235 (2nd Cir. 1972)), 415 U.S. at 667, n. 11, "the fundamental goal of congressional welfare legislation" is "the satisfaction of the ascertained needs of impoverished persons". However

> As time goes by . . . retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained needs and existing needs becomes less clear. *Ibid.*

Compensatory relief which results in retroactive payments also has the effect of depriving the state of scarce funds, appropriated and needed for the state's current budgetary requirements, as reparations for the past.

Given the change in law pursuant to which the AABD program was replaced by the SSI program, see p. 25, *supra,* and the relatively distant time period in which benefits were withheld, Petitioner submits that any form of notice relief with respect to retroactive benefits is barred by the Eleventh Amendment as compensatory relief. Such relief is neither "a necessary consequence of" nor an "adjunct to the purely prospective relief granted" in 1972.

E.

There Is No Post-*Edelman* Authority In Support Of The En Banc Order Permitting Notice Relief.

Respondent below relied basically on five cases for the proposition that the Eleventh Amendment and *Edelman* do not preclude a federal court from fashioning notice relief concerning retroactive benefits. Two of those cases were pre-*Edelman* and do not support Respondent's post-*Edelman* motion. *Grubb* v. *Sterrett, supra; Doe* v. *Gillman, supra.*[10] A third, *Morris* v. *Houston, supra,* has already been adequately distinguished as involving prospective relief. Judge Whelan, in the Court of Appeals panel decision,

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10. *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *sum. affd.* 400 U.S. 922, and *Doe* v. *Gillman,* 479 F. 2d 646 (8th Cir. 1973) *cert. denied,* 421 U.S. 920 (1975), were similar cases. Both district court decrees ordering notice were based upon the failure of state officials to act pursuant to federal statutes with respect to eligibility and entitlement to benefits under federal assistance programs. In *Grubb,* the court ordered Indiana officials to advise the plaintiffs of their eligibility for benefits and of their right to seek retroactive payments under state law. In *Doe* the district court ordered the state officials to notify plaintiffs that prior action by the state had been erroneous with regard to eligibility. Neither court was not confronted with an Eleventh Amendment defense. Both cases were decided prior to this Court's decision in *Edelman* which was "the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment" issue. 415 U.S. at 670-671. While the summary affirmance in *Grubb* may be binding upon lower courts, *Hicks* v. *Miranda,* 422 U.S. 332 (1975), it has little value as precedence in the Supreme Court. *Edelman,* 415 U.S. at 671.

clearly demonstrated the non-applicability of the remaining two, *Fitzpatrick* v. *Bitzer* 427 U.S. 445 (1976); *Lewis* v. *Shulimson,* 534 F. 2d 794 (8th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). Petitioner stands on Judge Whelan's remarks. 551 F. 2d at 155.

The *Grubb* case however deserves additional comment if only because Respondent insists that its ruling on notice still is good law. Respondent claims that because *Edelman* expressly overruled three other summary affirmances of judgments which had ordered the actual payment of retroactive benefits, and did not so specifically state as to *Grubb,* that the summary affirmance still stands. 415 U.S. at 670, n. 13. Such a result would be absurd, for the Supreme Court in *Edelman,* in footnote 13, in referring to the three cases by name, stated that "[D]ecisions of this Court in which we summarily affirmed a decision of a lower federal court which ordered the payment of retroactive awards and in which the jurisdictional statements filed in this Court raised the Eleventh Amendment defense *include:*" (Emphasis supplied.)

Clearly, the majority opinion did not mean that if there were other such cases they could still stand as binding authority, despite the decision in the case.

Thus, Mr. Justice Douglas in dissent, 415 U.S. at 683, cites other cases which had been affirmed by the Supreme Court in spite of the argument that the order was an incursion on the Eleventh Amendment. Certainly it cannot be contended that just because Mr. Justice Rehnquest for the majority did not specifically refer to them by name, they are still good law. One of these was *Gaither* v. *Sterrett,* 346 F. Supp. 1095 (N.D. Ind. 1972), *aff'd.* 409 U.S. 1070, which grew out of Indiana's statutory response to the *Grubb* v. *Sterrett* decision.

While there is no post-Edelman authority supporting the *en banc* decision being reviewed here, Petitioner's Eleventh Amendment defense is squarely buttressed by the decision in *Fanty* v. *Commonwealth of Pennsylvania, Dept. of Public Welfare,* 551 F. 2d 2 (3rd Cir. 1977), *pet. for cert. filed* June 3, 1977, No. 76-6853. The Seventh Circuit in its opinion openly concedes that "there are some factual distinctions between [*Fanty*] and the present case, but they are not so significant as to avoid conflict in principle" with the conclusion reached. 563 F. 2d at 873

In *Fanty* recipients of lump-sum social security benefits filed suit against officials of Pennsylvania to enjoin the defendants from attempting to collect their federal benefits in reimbursement of amounts granted under state welfare laws. While the state has terminated its collection practices, the District Court, acknowledging that *Edelman* stood as a bar to restitution of benefits illegally collected, nonetheless ordered notice relief on the theory that notice constituted "limited prospective relief".

Notice relief was ordered for two sub-classes of recipients, 551 F. 2d at 3:

> (1) welfare recipients who are currently reimbursing DPW, on an installment basis for claims established prior to November 1, 1973 [the date the state terminated its collection practice]; and
>
> (2) all welfare recipients who may have pendant state law claims again DPW, i.e., persons who have made either lump sum or installment reimbursement payments to DPW since November 1, 1973, either because DPW coerced or misled them into making such payments or because the payment though voluntary was obtained in violation of DPW regulations which prohibit case workers from becoming involved in the collection process.

The notice would inform members of each subclass that (a) they were under no legal obligation to make reimbursement and (b) they may have a state claim for a refund.

Chief Judge Seitz's opinion in *Fanty* constitutes the opinion of the Court of Appeals, is therefore the controlling opinion in the case[11], and is the one upon which Petitioner relies. Judge Seitz found the District Court's order

> [m]ust be regarded as a grant of relief, and not as a measure adopted to supervise the conduct of the litigation, since the district court was attempting to make welfare recipients aware of their possible right to file state petitions for refunds. Second, while the district court was concerned about payments which federal beneficiaries might make in the future, this concern was motivated by its view of DPW's past, not current practices.
>
> * * * * *
>
> [w]hile plaintiffs requested relief for "all present and past" federal welfare recipients "who have been . . . or are subject" to DPW collection efforts, the court only granted notice to those who have been affected by past practices.
>
> In sum, the court's order looks to a "past breach of a legal duty," and is not a "necessary consequence of compliance in the future with a substantive federal-question determination." 551 F. 2d 4-5

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11. Judge Garth concurred in the reversal of the District Court's order on the ground that there was no case or controversy. Judge Hunter dissented but in doing so conceded "[T]here may be Eleventh Amendment problems" with the relief granted the second subclass. 551 F. 2d at 11, n. 2

This reasoning led Judge Seitz to conclude, correctly, that the notice relief ordered for both subclasses was not "limited prospective relief" against a state official, but prohibited retrospective relief against the State of Pennsylvania.

Petitioner submits that *Fanty* is persuasive authority that the notice relief granted in the instant case is similarly barred by the Eleventh Amendment and this Court's decision in *Edelman.*

CONCLUSION

In *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459, 464 (1945) this Court stated:

> When the action is *in essence* one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity from suit . . ." (Emphasis added).

Petitioner submits that the Motion for Notice Relief and the *en banc* judgment of the Court of Appeals for the Seventh Circuit are directed against a nonconsenting sovereign state in violation of the law of this case as established by this Court in *Edelman* and the Eleventh Amendment to the United States Constitution.

Petitioner requests that the *en banc* judgment and opinion below be reversed and remanded with specific instructions to insure that both the letter and the spirit of the Court's mandate are faithfully executed.

Respectfully submitted,

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SUPPLEMENT

SUPPLEMENT

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution.

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State."

FEDERAL REGULATIONS INVOLVED

45 C.F.R. § 206.10 Application, determination of eligibility and furnishing of assistance.

(a) *State plan requirements.* A State plan under title I, IV-A, X, XIV, XVI, or XIX of the Social Security Act shall provide that:

* * * * *

(3) A decision shall be made promptly on applications, pursuant to reasonable State-established time standards not in excess of:

(i) 45 days for OAA, AFDC, AB, AABD (for aged and blind), and MA (for aged, blind, and families with children); and

(ii) 60 days for APTD, AABD (for disabled) and MA (for disabled). Under this requirement, the applicant is informed of the agency's time standard in acting on applications, which covers the time from date of application under the State plan to the date that the assistance check, or notification of denial of assistance or change of award, or the eligibility decision with respect to medical assist-

ance, is mailed to the applicant or recipient. The State's time standards apply except in unusual circumstances (e.g., where the agency cannot reach a decision because of failure or delay on the part of the applicant or an examining physician, or because of some administrative or other emergency that could not be controlled by the agency), in which instances the case record shows the cause for the delay. The agency's standards of promptness for acting on applications or redetermining eligibility shall not be used as a waiting period before granting aid, or as a basis for denial of an application or for terminating assistance.

• • • • •

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

v.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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Louisiana v. Jumel, 107 U.S. 711 (1882).....37
Lynch v. Household Finance Corp., 405 U.S. 538 (1972).....49,57

Mann v. Department of Public Aid, 31 Ill. App. 3d 430, 333 N.E.2d 233 (1975).....19
Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).....57
McNeese v. Board of Education, 373 U.S. 668 (1963).....51
Memphis Light, Gas & Water Division v. Craft, 98 S. Ct. 1554 (1978).....18
Milliken v. Bradley, 433 U.S. 267 (1977).....27,33,34,59, 60,61,62,63
Mitchum v. Foster, 407 U.S. 225 (1972).....49,50,55
Monell v. Department of Social Services of the City of New York, 98 S. Ct. 2018 (1978).....49,51,52,53,55
Monroe v. Pape, 365 U.S. 167 (1961).....49,51,52,54
Morris v. Houston (R. Vol. IV, Item 36, Attachment) (W.D. Mich. 1974), *rev'd on other grounds*, 516 F.2d 902 (6th Cir. 1975) (table).....44
Munn v. Illinois, 94 U.S. 113 (1876).....56
Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904).....12
Mutual Life Ins. Co. v. Hill, 178 U.S. 347 (1900).....13

North Carolina v. Temple, 134 U.S. 22 (1890).....37

Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737 (1824).....36,38,45
Owens v. Roberts, 377 F. Supp. 45 (M.D. Fla. 1974).....46

Parden v. Terminal Railway, 377 U.S. 184 (1964).....25,32
People ex rel. Naughton v. Swank, 58 Ill. 2d 95, 317 N.E.2d 499 (1974).....16
Perez v. Campbell, 402 U.S. 637 (1971).....49
Perry v. Sindermann, 408 U.S. 593 (1972).....35
Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275 (1959).....25

Re Sanford Fork & Tool Co., 160 U.S. 247 (1895).....12,13,23
Reagan v. Farmers Loan & Trust Co., 154 U.S. 362 (1894).....37
Robinson v. Washington, 302 F. Supp. 842 (D.D.C. 1968).....43
Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd mem.*, 403 U.S. 901 (1971).....3,49
Rosado v. Wyman, 397 U.S. 397 (1970).....48,49
Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971).....22

Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U.S. 312 (1895).....12
Scheuer v. Rhodes, 416 U.S. 232 (1974).....27
Shea v. Vialpando, 416 U.S. 251 (1974).....48

Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969) *aff'd mem.*, 396 U.S. 5 (1969) 43

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 13

Steffel v. Thompson, 415 U.S. 452 (1974) 51,54,57

Sterrett v. Grubb, 400 U.S. 922 (1970), *aff'g mem.*, 315 F. Supp. 990 (N.D. Ind. 1970) 40,44

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 42

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 57,58

Townsend v. Swank, 404 U.S. 282 (1971) 48

Turner v. Walsh, 435 F. Supp. 707 (W.D. Mo. 1977), *aff'd*, 574 F.2d 456 (8th Cir. May 3, 1978) 35

Turoff v. Union Oil Co., 61 F.R.D. 51 (N.D. Ohio 1973) 22

Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961) 21

United States v. Texas, 447 F.2d 441 (5th Cir. 1971), *stay denied sub nom.*, Edgar v. United States, 404 U.S. 1206 (Black, Circuit Justice, 1971) 62

Van Lare v. Hurley, 421 U.S. 338 (1975) 48

Vickers v. Trainor, 546 F.2d 739 (7th Cir. 1976) 16

Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920) 12

Wicker v. Hoppock, 73 U.S. (6 Wall.) 94 (1867) 61

Younger v. Harris, 401 U.S. 37 (1971) 32,58,59,60,63

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United States Constitution:

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Federal Statutes:

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42 U.S.C. §§1381-1385 (1969) 2

42 U.S.C. §1382(a)(4) (1969) 16,20

42 U.S.C. §1983 ..... *passim*

Freedman's Bureau Act of 1865, ch. 90, §§1-5, 13 Stat. 508 50

Freedman's Bureau Act of 1866, ch. 200, §§1-15, 14 Stat. 173 50

Pub. L. No. 94-574, 90 Stat. 2721 (1976) 28

Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 43 56

Federal Rules of Civil Procedure:

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Notes of Advisory Committee on Federal Rules of Civil Procedure, Rule 23(d)(2) 21

State Statutes:

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Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977) 17,20
Ill. Rev. Stat., ch. 23, §11-6 (1977) 18,19
Ill. Rev. Stat., ch. 23, §11-8 (1977) 17,19
Ill. Rev. Stat., ch. 23, §11-8.7 (1977) 18,31
Ill. Rev. Stat., ch. 110, §§264-279 (1977) 16,18

Federal Regulations:

45 C.F.R. §205.10(a)(i977) 17,20
45 C.F.R. §205.10(a)(3) (1977) 2
45 C.F.R. §205.10(a)(5) (1977) 17
45 C.F.R. §205.10(a)(18) (1977) 17,41
45 C.F.R. §205.10(b)(2) (1977) 17,45
45 C.F.R. §206.10(a)(3) (1977) 18

Congressional Materials:

CONG. GLOBE, 42d Cong., 1st Sess., at 501 (1871), Remarks of Sen. Frelinghuysen 52
CONG. GLOBE, 42d Cong., 1st Sess., at 502 (1971), Remarks of Sen. Frelinghuysen 54
CONG. GLOBE, 42d Cong., 1st Sess., App. at 68 (1871), Remarks of Rep. Shellabarger 52
CONG. GLOBE, 42d Cong., 1st Sess., App. at 314 (1871), Remarks of Rep. Burchard 54

Other Materials:

Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977) 33
W. BENNETT, AMERICAN THEORIES OF FEDERALISM (1964) 50

Z. CHAFEE, SOME PROBLEMS OF EQUITY (1950) 22
Developments in the Law - Section 1983 and Federalism, 90 HARV. L. REV. 1133 (1977) 50,59
Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972) 37,46
Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977) 24
H. HYMAN, A MORE PERFECT UNION (1973) 50
M. IRISH & J. PROTHO, THE POLITICS OF AMERICAN DEMOCRARY (1959) 25
Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) 31,45
Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) 21
M. KONVITZ, A CENTURY OF CIVIL RIGHTS (1961) 50
LeClercq, *State Immunity and Federal Judicial Power - Retreat from National Supremacy*, 27 U. FLA. L. REV. 361 (1975) 33,46
Liberman, *State Sovereign Immunity in Suits to Enforce Federal Rights*, 1977 WASH. U.L.Q. 195 37
Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973) 21
1B MOORE'S FEDERAL PRACTICE, ¶0.404[1] at 404-405 (2d ed. 1974) 12
Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) 59

Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. INDUS. & COM. L. REV. 577 (1969) 21

M. REAGAN, THE NEW FEDERALISM (1972) 48

Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976) 27

1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1926 ed.) 24

Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977) 59,60

Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876*, 13 AM. J. L. HIST. 222 (1969) 50

7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §1793, at 201 (1972) 21

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

v.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. Does this Court's prior decision reversing a federal court judgment of damages against a State based on the Eleventh Amendment constitute the "law of the case" as to relief ordering state officials to give notice to the class members of certain rights?

2. Does the Eleventh Amendment constitute a jurisdictional bar in a suit brought under 42 U.S.C. §1983 to a federal court order which neither awards damages nor purports to adjudicate the monetary liability of the State,

but rather orders state officials to send notice to members of a duly certified class of public aid recipients informing them that they may appeal, if they so desire, the denial of benefits through pre-existing state administrative remedies?

STATEMENT OF THE CASE

This case was brought by John Jordan, a needy disabled person, on behalf of a class of needy aged, blind, and disabled persons in Illinois applying for Aid to the Aged, Blind and Disabled (hereinafter "AABD"), a federal/state grant-in-aid program under the Social Security Act, 42 U.S.C. §§1381-1385 (1969). The State of Illinois chose to participate in the AABD program and to comply with the provisions of the Social Security Act and regulations promulgated thereunder. The pertinent facts for purposes of the petition are that federal regulations were promulgated requiring that (a) all applications for AABD be processed within specified maximum time periods, and (b) for those persons determined eligible whose applications were delayed in processing beyond the maximum time periods, assistance was to be provided effective as of the last day of the time period in which the application should have been processed.[1]

The director of the Illinois Department of Public Aid knew that these federal regulations were mandatory and binding, yet promulgated and enforced state regulations

[1]The maximum time limits were 30 days for the aged and blind, and 45 days for the disabled. (R. Vol. 1, Exh. A attached to Item 39 and Item 13) As of January 1, 1971, the maximum time limit for the disabled was increased to 60 days. These standards are now codified at 45 C.F.R. §206.10(a)(3)(1977).

directly contrary to the federal requirements (A. 37a-39a). The state regulations prohibited the authorization of assistance for any period prior to the month in which the application was approved.[2] Because of substantial delays in the processing of assistance applications, these regulations had the effect of reducing the amount of benefits initially received by eligible AABD applicants. In October 1970, three months prior to the filing of this suit, in a case involving a class of AFDC applicants in Illinois (*Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970)), these very regulations were held by a three-judge federal court to be contrary to the federal regulations and therefore were deemed "null and void." *Rodriguez v. Swank* (Judgment entered Oct. 1970, ¶7) (R. Vol. 1, Item 9, Exh. B) *aff'd mem.*, 403 U.S. 901 (1971). The state public aid officials, however, continued to apply the regulations to the aged, blind and disabled.

For example, the application of the named plaintiff, John Jordan, a mentally retarded 61-year old man, was filed in September 1970, but was not finally acted upon and approved until January 1971. Based upon the state regulations, he was granted assistance effective only as of January 1, 1971, the month in which his application was approved; he was denied AABD benefits for the months of November and December 1970 which he should have received in accordance with the federal requirement that the effective date of assistance was the last day on which his application should have been processed. His case is typical;

[2]The regulations are quoted in *Edelman v. Jordan*, 415 U.S. 651, 655 n.4 (1974). The net effect of these Illinois regulations was to create a financial disincentive to the prompt processing of applications. For every month that an application was delayed, the Department saved the expenditure of the monthly entitlement of the eligible recipient.

each member of the class was denied benefits as a result of the enforcement of the challenged state regulations.

In the prior appeal in this case, *Edelman v. Jordan*, 415 U.S. 651 (1974) (hereinafter "*Jordan I*"), this Court upheld the provisions of the final judgment of the district court declaring the state regulations contrary to federal law and therefore void under the Supremacy Clause, and the provisions requiring the state public aid officials to process all AABD applications in the future in accordance with federal requirements. However, this Court reversed the portion of the Court of Appeals' decision (472 F.2d 985 (7th Cir. 1973)) upholding the district court's order that Illinois pay all AABD benefits which had been illegally denied members of the plaintiff class. The Court remanded the cause "for further proceedings consistent with" its opinion. 415 U.S. at 678.

On remand in the trial court, the members of the plaintiff class were in the anomalous position of never having received any notice explaining the established state administrative system for appealing the denial of public aid benefits, or a notice that they had been denied benefits for the period between the last day on which their applications were required to have been acted upon and the first day of the month in which their application actually was approved. Consequently, the respondent, on behalf of the class, filed a motion seeking to require the defendant "to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty (60) days through the state's administrative procedures..." (A. 31a) Prior to ruling on the motion, the trial court ordered the parties to submit information with respect to the number of persons in the plaintiff class, the cost of notifying them, the amounts involved, and other

issues affecting the equities of sending notice. The plaintiffs filed their response to the court's inquiries (A. 34a-39a); the public aid officials submitted no response.

After full consideration of both the Eleventh Amendment and equitable issues presented by the plaintiffs' motion, the trial court ruled in favor of the plaintiff class. *Jordan v. Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975). The district court reasoned that notice relief "while related to possible retroactive benefits, is clearly not an award of those benefits" and concluded that an order requiring notice of the "possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class . . . falls outside the area proscribed by the Supreme Court's *Edelman* opinion." *Id.* at 805. The decree entered by the trial court required the state public aid officials to mail to the members of the plaintiff class a notice of right to appeal denial of benefits (A. 54a) and the standard Illinois Department of Public Aid notice of appeal form, to be signed and returned, if so desired (A. 55a-56a).

The actual sending of the notices was stayed pending appeal, but the district court refused to stay the determination of the names, addresses and amount of benefits at issue for each member of the plaintiff class. (A. 53a) The Seventh Circuit similarly denied a motion for such a stay to the extent that such information could be produced by computer, and denied without prejudice to its renewal, a motion for stay with respect to case information that could not be produced by computer.[3]

[3]The director of the Illinois Department of Public Aid has now filed with the district court the names, addresses, and amounts of benefits denied for 80% of the plaintiff class. For the remaining 20%, the names and addresses are filed with the Court but there is no figure as to the amount of benefits at issue; for them the petitioner was unable to calculate by computer the amount of benefits at issue, and the district court ruled that a case-by-case computation did not have to be made for the purpose of indicating the amount at issue in the notice.

In an opinion written by District Judge Whelan (of the Central District of California sitting by designation), the court of appeals reversed the holding of the trial court. The panel concluded that the notice relief was contrary to the bar of the Eleventh Amendment. *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977). Relying on *Jordan I*, the panel interpreted the Eleventh Amendment to be "a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program." *Id.* at 155.

The court of appeals on rehearing *en banc* held that the trial court's judgment and, in particular, the two notices, insofar as they may have predetermined, or purported to predetermine in any way, the liability of the petitioner, controverted the Eleventh Amendment. *Jordan v. Trainor*, 563 F.2d 873 (7th Cir. 1977). However, the *en banc* Court of Appeals held that permissible notice to the plaintiff class could be fashioned within the strictures of the Eleventh Amendment to the extent that the notices did not in any way decide or purport to decide the liability of the State but instead merely advised the members of the plaintiff class that there were available preexisting state administrative remedies in which they might contest, if they so desired, the denial of benefits in accordance with state law.[4]

In the majority opinion written by Circuit Judge Harlington Wood, the court first noted that the *Jordan I* decision held that the Eleventh Amendment barred a federal court from imposing against the State "the award of an accrued monetary liability" (415 U.S. at 664) which was indistinguishable from damages. The *en banc* decision

[4]Thus, the language regarding entitlement (Pet. Br. at 8) would not be contained in notices tailored to meet the requirements of the court of appeals *en banc* decision.

held, however, that notice relief "would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court." 563 F.2d at 876. Further, "the parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state." *Id.* at 875. In other words, "[a]s for the state, our decision means only that if an [administrative] appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant." *Id.* at 878. The majority concluded that:

> The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment."

Id. at 878.

SUMMARY OF ARGUMENT

In *Edelman v. Jordan*, 415 U.S. 651 (1974) (*Jordan I*), this Court held that the Eleventh Amendment deprives a federal court of jurisdiction to enter a judgment directly against the state treasury. This holding in *Jordan I* was supported by the historical purpose of the Eleventh Amendment to prevent federal court money judgments against the treasuries of the States. The notice relief

approved by the Court below is both factually and conceptually different from the relief reviewed in *Jordan I.* The notices will inform the members of the plaintiff class that there are existing *state* administrative remedies in which the class members potentially can challenge the denial of benefits at issue; however, the notices specifically and the judgment in general do not predetermine, or purport to predetermine, any state liability, leaving that determination solely to the state administrative and judicial processes. Such relief raises issues that were neither presented nor decided in *Jordan I.* Therefore, the doctrine of the "law of the case," which applies only to those matters previously decided, is not applicable to the issues now before the Court.

The notice relief directed at a state officer is neither a monetary judgment against the State nor an intrusion upon the integrity or legitimate activities of state government, as was the relief in *Jordan I.* The petitioner now seeks to extend *Jordan I* and contends that it shields knowing violations of federal law even where there is no monetary judgment sought against the State in federal court, and where the relief requested respects the institutions of state government. Neither the purposes of the Eleventh Amendment, nor principles of sovereign immunity or federalism embodied in the Eleventh Amendment, support the contention of the petitioner.

With the exception of money judgments against the State, there is no basis for conclusively presuming that the State as sovereign has any interest under the Eleventh Amendment or otherwise in shielding its officials from remedies to redress their illegal actions. This is particularly true where, as here, the State has adopted administrative remedies specifically for the purpose of ensuring that each public aid

recipient receives the benefits to which he is entitled. Petitioner does not seek to protect state sovereignty here; rather, he seeks to block access to state review of his illegal policies. The Eleventh Amendment does not provide such a shield for the illegal acts of state officers.

Moreover, the notice relief approved by the court below is consistent with the "principles of federalism that inform Eleventh Amendment doctrine . . . ." *Hutto v. Finney*, 46 U.S.L.W. 4817, 4820 (June 23, 1978). Petitioner does not purport to explain how the notice relief undermines the principles of federalism, nor does petitioner cite any case in which this Court has held the Eleventh Amendment to be a bar to relief against state officers where the relief was not a significant intrusion upon the integrity of state government. The notice relief at issue harmonizes the federal-state interests in the AABD program, and reserves to the state agency and state courts the ultimate determination of the state's liability.

There will be cases in which federal courts, in the exercise of their equitable powers, will decline to require notices, although finding violations of the Social Security Act by state public aid officials. But quesitons of equitable discretion are not to be confused with Eleventh Amendment jurisprudence. Nothing in the language, or intended purposes of the Eleventh Amendment, or case law, supports a blanket constitutional bar to a federal court's entry of an order requiring state officers to send notices advising class members of existing state remedies.

This conclusion is further supported by federal statutes, federal regulations, and state laws that require public aid recipients (1) to be notified in writing when denied assistance, and (2) to be informed of the opportunity for a fair hearing before the state agency to challenge any

adverse action taken against them by public aid officials. In addition, the trial court's order requiring the sending of notices to respondents falls within the purposes of Fed. R. Civ. P. 23(d)(2) to inform and protect unnamed members of the class, who in the current instance remain wholly in the dark regarding this lawsuit and how it affects them. The notice relief remedies this situation by informing them of both the court's decision, and also their rights within the state public aid administrative system.

Finally, the relief is not only permissible under the Eleventh Amendment but is wholly consistent with the principles of federalism reflected in Section 1 of the Civil Rights Act of 1871, now 42 U.S.C. §1983, which was enacted by Congress to provide an effective federal remedy for infringement of federal rights by state officers. The notice relief approved by the court below fulfills the purpose of Section 1983 by vindicating the federal rights of respondents. At the same time, such relief harmonizes considerations of federalism and comity by respecting the state's legitimate spheres of independence in the administration of its public assistance program and in the determination of its own monetary liability. To reverse the court of appeals in this case in deference to petitioner's distorted notions of state sovereignty would emasculate the remedial purposes of Section 1983.

The federalism interests expressed in the Eleventh Amendment and Section 1983, when harmonized, require sensitivity to the legitimate interests of both State and National governments, and the notice relief approved by the court below satisfies that standard. To bar such notice relief would subordinate the legitimate interests of both the State and National governments to the desire of a state official to block access to State remedies expressly designed for challenges to violations of law by state officers.

I.

THE ISSUES NOW PRESENTED TO THE COURT WERE NEITHER PRESENTED, NOR DECIDED, IN *JORDAN I* AND THEREFORE THE DOCTRINE OF THE LAW OF THE CASE IS NOT PROPERLY INVOKED.

A. *Jordan I* Foreclosed Only the Question of Whether the Federal Court Had Jurisdiction to Impose a Money Judgment Against the State.

In *Jordan I* this Court reversed "that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid . . . ." 415 U.S. at 659. "The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion." *Id.* at 678. The petitioner contends that the notice relief approved by the Court of Appeals *en banc*, violates the law of the case as established in *Jordan I.* (Petitioner's Brief, hereinafter "Pet. Br.," at 14) This contention misconstrues the doctrine of the law of the case, a doctrine that simply has no application here because the notice relief unquestionably presents wholly different issues than those decided in *Jordan I.*

"[T]he 'law of the case' may not be properly invoked where the case is not the same; or where, although the case is the same, the matter now presented was not previously determined." 1B MOORE'S FEDERAL PRACTICE, ¶0.404[1] at 404-405 (2d ed. 1974). This principle was enunciated in *Re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), a case relied upon by petitioner (Pet. Br. at 20-21),

but supportive of the respondents here. The plaintiffs in that case had originally filed a bill in equity to set aside a mortgage that a bankrupt manufacturer had made to secure debts to its former directors, and prevailed. After the Supreme Court reversed (*Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U.S. 312 (1895)), the plaintiffs filed a motion to amend the bill. The defendants petitioned this Court arguing a violation of the law of the case doctrine. In rejecting this argument and denying the petition, the Court stressed that its earlier opinion had not adjudicated every issue in the case, and that issues not decided could still be contested.

> If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its actions may be controlled either upon a new appeal . . . or by a writ of mandamus . . . But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only.

160 U.S. at 255-56. *Accord, Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) (amendment of bill after the appellate court overruled the trial court's refusal to grant a demurrer). *Compare Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129 (1921), *with Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904), *with Mutual Life Ins. Co. v. Hill*, 178 U.S. 347 (1900). In each of these pairings of cases, the Court emphasizes that the law of the case refers only to the precise issues decided by the highest court; the law of the case does not, and cannot, encompass issues not presented to the court, or even issues the court might have answered, but did not.

Similarly, the principle that a lower court may not vary

the mandate of an appellate court, prevents the lower court in subsequent proceedings from reconsidering the precise issues decided on appeal, but only those issues. The mandate of the court of appeals pursuant to *Jordan I*, in relevant part, ordered "that the district court's award of retroactive benefit payments to plaintiffs is reversed . . ." Petitioner urges that this mandate precluded the district court from considering the question of "notice in any form." Pet. Br. at 18. Just as with the law of the case doctrine, the mandate bars only that which was decided, and therefore consideration of the propriety of notice relief by the court below did not violate the mandate.

> The general proposition which moved [the District] Court — that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid to rest — is undisputable . . . . But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See *Re Sanford Fork & Tool Co.*, 160 U.S. 247.

Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (Frankfurter, J.).

In *Jordan I*, this Court, after stressing it was only judging the "award actually made in this case, and not one which might have been differently tailored in a different case" (415 U.S. at 665), held that the district court lacked jurisdiction to award the respondents a money judgment against the State and remanded the cause for further proceedings consistent with its opinion. This decision concerned only a direct money judgment and imposed a limitation on federal courts that the Court held was within

the traditional contours of the Eleventh Amendment bar to relief (Section II. A. *infra*).

The decision now under review does not award damages or restitution, nor any relief which compensates *per se* for the Illinois official's violation of the law. It simply would give notice to class members that, if they so desire, they may utilize preexisting state remedies to attempt to recover benefits. Those class members who choose to exercise that remedy may or may not recover, with the result dependent on the state administrative agency and the state courts. Far from violating *Jordan I*'s mandate or the law of the case, the notice relief is an outgrowth of *Jordan I* that respects the limitation articulated in *Jordan I* on the federal court's power to give full relief. The notice relief closes the case in a logical and orderly manner by providing, for the first time, notice to the class explaining the result of the action filed on their behalf and their possible remedies outside the federal forum.

B. The Notice Relief Developed on Remand is Designed to Fulfill the Requirements of Both Federal and State Law.

Under the original judgment, the members of the class (identified in paragraph 5) were to be paid all benefits which they should have received but for the enforcement of the state regulations held to be void. (A. 25a-27a)[5] On remand

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[5]Petitioners now assert that the relief granted to such class was entered on behalf of a noncertified Count II class. (Pet. Br. at 6 n.4, 9, 25, and 27) This contention was never before presented to any court reviewing this cause, and neither presented in the petition for certiorari,

(continued)

from *Jordan I*, the class members identified in paragraph 5 of the original judgment were in the position of never having received any notice whatsoever regarding the complaint, the original judgment, the Supreme Court decision, or its effect on them. Moreover, they had never received notice from the state public aid officials that they had been denied AABD benefits as a result of state regulations which had been voided by the Court in this case. These individuals were, and still remain, wholly in the dark. In this posture, on remand from *Jordan I*, respondents sought an order requiring the petitioner to notify the class members (specified in paragraph 5 of the original judgment) of the petitioner's denial of AABD benefits pursuant to regula-

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(footnote continued from preceding page)

nor in the questions presented for review. Therefore, it is not properly before this Court. Moreover, this contention is simply erroneous. Count II of the complaint sought to secure benefits from the date of application; this claim was rejected and the Count II class was never certified. Count I of the complaint challenged petitioners' failure to comply with federal law requiring benefits from the last day of the federal time standards, and the Count I class was certified. (A. 20a) In the original district court opinion, with respect to restitution of benefits, the court defined the class as

> those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30-day or 45-day (60 days for Aid to the Disabled as of January 1, 1971) limits.

(R. Vol. II, p. 320)

All such persons were included in paragraph 5 of the final judgment (A. 25a-26a), and in accordance with Rule 23(c)(3), this paragraph described in detail those whom the court included as class members under Count I. On remand, the district court opinion, *Jordan v. Trainor*, 405 F. Supp. at 804, and final judgment (A. 51a-53a) once again define the same class in accordance with Rule 23(c)(3). In fact, this description is sufficiently detailed so that petitioner has been able to compile lists of all class members.

tions held invalid in this case, and of their right to file a notice of appeal challenging the denial of said benefits, as in the case of any other denial of benefits. (A. 13a)

The notice relief sought by the respondent in the district court could not be secured in the Illinois state courts. Suits challenging public aid officials' failure to comply with the Social Security Act cannot be brought under Section 1983 in the state courts on behalf of a class of public aid recipients. *Chicago Welfare Rights Organization v. Weaver*, 56 Ill.2d 33 305 N.E.2d 140 (1973), *appeal dismissed, cert. denied sub nom., Chicago Welfare Rights Organization v. Edelman*, 417 U.S. 962 (1974). The exclusive remedy in Illinois, its courts have held, is for individual recipients to present their legal claim in an administrative fair hearing, and, if unsuccessful, then to seek judicial review of the administrative decision under the Illinois Administrative Review Act. Ill. Rev. Stat., ch. 110, §§264-279 (1977). *Id.* at 39, 305 N.E.2d at 143. *Accord, People ex rel. Naughton v. Swank*, 58 Ill.2d 95, 317 N.E.2d 499 (1974); *Ballew v. Edelman*, 39 Ill. App. 3d 490, 340 N.E.2d 155 (1975). *See also, Vickers v. Trainor*, 546 F.2d 739, 744-747 (7th Cir. 1976) (*Pullman*-type abstention improper where class challenged public aid officials' failure to provide certain social services to welfare recipients in violation of Social Security Act, in part because Illinois state courts will not entertain challenge by class that public aid regulations violate federal law.)

The Social Security Act, 42 U.S.C. §1382(a)(4) (1969), required that every state participating in the AABD program, including Illinois, must "provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for aid or assistance under the plan is denied or is not acted upon with reasonable promptness."

Pursuant to this statutory mandate, and the guarantees of due process (*cf. Goldberg v. Kelly*, 397 U.S. 254 (1970)), HEW promulgated regulations, now codified at 45 C.F.R. §205.10(a) (1977), requiring each state to adopt an administrative "fair hearing" procedure to afford applicants and recipients a means by which they might challenge any adverse action taken against them by state public aid officials. As a participating state, Illinois has adopted a "fair hearing"mechanism. Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977).

Under federal law, a hearing is required for any recipient "who is aggrieved by any agency action resulting in . . . reduction . . . of assistance" (45 C.F.R. §205.10(a)(5) (1977)). The corresponding state law provision guarantees applicants or recipients the right to appeal a decision "granting aid in an amount which is deemed inadequate." Ill. Rev. Stat., ch. 23, §11-8 (1977). If a recipient proves successful on his or her claim at the administrative level or if the agency "decides in favor of the claimant prior to the hearing," 45 C.F.R. §205.10(a)(18) (1977) requires the state public aid officials to "promptly make corrective payments retroactively to the date the incorrect action was taken."[6]

Although not required by the Social Security Act, Illinois (Ill. Rev. Stat., ch. 23, §11-8.7 (1977)) has conferred upon public aid recipients a right to have the hearing examiner's decisions reviewed in the state courts, pursuant to the Illinois Administrative Review Act, Ill. Rev. Stat., ch. 110,

[6]Pursuant to 45 C.F.R. §205.10(b)(2) (1977), federal financial participation is available for

> Payments of assistance made to carry out hearing decisions, or to take corrective actions after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable federal policies on corrective payments.

§§264-279 (1977). And if the Illinois courts require "corrective payments" of money from the state treasury, there is no problem of immunity, for the State has, in the exercise of its sovereign power, consented to suits in its own courts seeking such relief. *Johnson v. Dept. of Public Aid*, 3 Ill. App. 3d 1045, 279 N.E.2d 791 (1972).

This entire "fair hearing" process, however, is necessarily triggered by a written notice to the applicant or recipient. The notice describes the action taken by the Department of Public Aid with respect to the recipient's assistance grant and the availability of the administrative hearing procedure, should the recipient wish to challenge the Department's decision.[7] The notice requirement is premised upon both state and federal law. Federal law requires that: "Every applicant or recipient shall be informed in writing . . . at the time of any action affecting his claim: (i) of his right to a hearing, as provided in paragraph (a)(5) of this section; [and] (ii) of the method by which he may obtain a hearing." 45 C.F.R. §205.10(a)(3) (1977). The corresponding state law provision, Ill. Rev. Stat., ch. 23, §11-6 (1977), requires such notice and has been strictly construed by the Illinois courts to require actual written notice to applicants who, like respondents, have received benefits for a substantial period of time, but never received an official determination on all aspects of their application for assistance.

For example, in *Isabell v. Department of Public Aid*, 18 Ill. App. 3d 868, 310 N.E.2d 742 (1974), a mother and

[7]This Court emphasized just last Term the importance of notice in an analogous context, and particularly notice which informs the citizen of (1) the adverse governmental action taken or to be taken against him; and (2) the procedure available for challenging such action. *Memphis Light, Gas & Water Division v. Craft*, 98 S. Ct. 1554. (1978).

her two children applied for a grant under the Aid to Families with Dependent Children program ("AFDC"), including special allowances on account of the family's extraordinary medical needs. Although the family was awarded an AFDC grant, they were never notified of any Department decision concerning their request for special allowances. More than 60 days after they received their first AFDC check, the family filed a notice of appeal seeking administrative review concerning the special allowance request. The Department took the position that in a case of delay in acting upon an application or a part of an application, the 60-day time limit in Ill. Rev. Stat., ch. 23, §11-8, for filing administrative appeals automatically begins to run on the day after the federal time limit for processing applications expires. In the alternative, it argued that the receipt of a check in an improper reduced amount placed the applicant on constructive notice of the Department's decision. The Illinois court, however, rejected both positions, holding that the statutory limitations period for seeking administrative review and the entire hearing process could not commence until the applicant received actual written notice of the Department's decision on his or her application for benefits. "Any other construction would not only raise serious questions under Federal law, but would emasculate an applicant's right to notice under Section 11-6. . . " *Id.* at 872, 310 N.E.2d at 745. *Accord, Mann v. Dept. of Public Aid*, 31 Ill. App. 3d 430, 333 N.E.2d 233 (1975).

The order entered by the district court, as modified by the *en banc* opinion of the court of appeals, simply provides the respondent class members with the written notice required under state and federal law, and notifies respondents that they may trigger the "fair hearing" procedures.

C. The Notice Relief Developed on Remand Fulfills the Federal Court's Duty Under Fed. R. Civ. P. 23(d)(2) to Protect and Inform the Unnamed Members of the Class.

Aside from the requirements of 42 U.S.C. §1382(a)(4) (1970), the regulations promulgated thereunder at 45 C.F.R. §205.10(a) (1977), and Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977), discussed *supra*, the notices to be sent in the present case fulfill the trial court's responsibilities, under Fed. R. Civ. p. 23(d)(2), to inform the unnamed members of the class represented by respondent of the terms of the judgment which binds them, and to protect these class members by notifying them of the state administrative remedy which is available to them. Rule 23(d)(2) provides, in relevant part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> * * *
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment....[8]

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[8]The Adivsory Committee Notes to Rule 23(d)(2) point out that "[s]uch notice is not a novel conception" and indicate that Rule 23(d)(2) merely codifies the previous law that the authority to order notice is an equitable power of the court. Prior to the 1966 amendments to Rule 23, it was clearly recognized that courts had inherent equitable power to give notice to absent parties whenever they deemed it advisable to do so. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1793 at 201 (1972); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 328 (1973); Newberg, *Orders in the*

(continued)

The Advisory Committee Notes to Rule 23(d)(2) state:

> [The] mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.

Professor Kaplan, a member of the Advisory Committee, states that the provision for notice under Rule 23(d)(2) "for the protection of the members of the class" and "for the fair conduct of the action" was inserted in response to Professor Chafee's admonition that class members "ought to be informed as well as represented." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of The Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 394 (1967). The complete quote from Professor Chafee indicates the basis for 23(d)(2):

> [C]ommon decency requires some sort of steps to be taken to apprise people that litigation is under way which seriously affects their life — insurance policies or other financial expectations. They ought to be informed as well as represented. They ought to have some notion of what is going on . . . representatives in a class suit can keep silent and leave completely in the dark hundreds of persons whose rights hinge on the outcome of an unknown equity suit.

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Conduct of Class Actions: A Consideration of Subdivision (d)," 10 B.C. INDUS. & COM. L. REV. 577 (1969). Thus, in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), the district court ordered notice advising class members of their right to present individual damage claims after the jury had found for the class on the liability issue.

Z. CHAFFE, SOME PROBLEMS OF EQUITY, 230 (1950).[9] (1950).[9]

The notices to be sent in the present case serve to fulfill the mandate of Rule 23(d) by providing for the protection of the members of the class, and the fair conduct of this action. As noted in the *en banc* opinion, "What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class." *Jordan v. Trainor*, 563 F.2d 873, 878 (7th Cir. 1977). The notices, as approved in the *en banc* opinion, do no more than inform the members of the plaintiff class of this suit, the fact that they have been denied benefits, and the availability of the Department's "fair hearing" procedures through which they may obtain a hearing concerning the amount of benefits denied them. Coupled with this notice is an appeal form virtually identical to the notice sent by the Department of Public Aid in every case of a denial or reduction of benefits, which, if returned to the Department of Public Aid within 60 days, would start the hearing process.

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[9]Notices under subsections (c)(2) and (d)(2) of Rule 23 have been required or suggested in a variety of contexts to protect the members of a certified class, or even members of putative classes. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831-32 (3d Cir. 1973); *Doe v. General Hospital*, 434 F.2d 427, 433 (D.C. Cir. 1970); *Rothman v. Gould*, 52 F.R.D. 494, 501 (S.D.N.Y. 1971) (notice required because widespread publicity could have led potential class members "to refrain from taking on the job for themselves"); *Turoff v. Union Oil Co.*, 61 F.R.D. 51 (N.D. Ohio 1973) (Rule 23 and due process require notice to persons who may have relied on class complaint in failing to press their own claims); *cf. American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-52 (1974) (not until "notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case").

In summary, the notice relief sanctioned by Rule 23, federal and state law, and equitable considerations, as well as the Eleventh Amendment (Section II, *infra*) and Section 1983 (Section III, *infra*) issues presented by such relief, were neither considered nor decided by this Court in *Jordan I*; therefore, contrary to the contention of the petitioner, the doctrine of the law of the case is not applicable. *See, e.g., Re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). Accordingly, on remand from *Jordan I*, the district court, and then the court of appeals, properly considered the issues presented by respondents' motion, and to those issues we now turn.

II.

ORDERING STATE OFFICIALS TO SEND NOTICE TO THE CLASS IS NEITHER A MONETARY JUDGMENT AGAINST THE STATE NOR AN INTRUSION UPON THE INTEGRITY OR LEGITIMATE ACTIVITIES OF STATE GOVERNMENT AND THEREFORE SUCH RELIEF IS NOT BARRED BY THE ELEVENTH AMENDMENT.

A. The Principles of Sovereign Immunity Embodied in the Eleventh Amendment Support a Bar to Federal Court Awards of Money Judgments Against the States, but Not a Blanket Bar to Relief Against State Officers Who Have Deprived Persons of Federal Rights.

The historical underpinning of the Eleventh Amendment

unquestionably centers on barring the federal courts' entry of money judgments directly against the States.[10] The decision in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), which prompted the Eleventh Amendment,[11] involved a suit to recover on a contract with the State of Georgia, and as recognized in *Parden v. Terminal Railway,* 377 U.S. 184, 187 (1964):

> [A] suit on state debt obligations without the State's consent was precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed. (Footnote omitted.)

In *Petty v. Tennessee - Missouri Bridge Comm'n,* 359 U.S.

[10]Other aspects of the intent of the framers of the Eleventh Amendment remain the subject of dispute, but a growing body of historical evidence is assembled in a scholarly article by Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One,* 126 U. PA. L. REV. 515 (1977), to support the following propositions, *inter alia:* (1) there was disagreement concerning the status of States' sovereign immunity among those involved in the ratification process of the Constitution, a disagreement that was not resolved when the Constitution was adopted; (2) sovereign immunity survived the Constitution as a common law requirement; and (3) when citizens sue their own States, sovereign immunity governs those cases only as a common law doctrine (*Id.* at 540 n.88). The author, while not taking issue with the holding in *Jordan I* as to damages, criticizes *Jordan I* for its treatment of historical sources. *Id.* at 529 n.54.

[11]In 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1926 ed.), it is noted that

> the real course of the attack on the *Chisholm Case* was the very concrete fear of the "numerous prosecutions that will immediately issue from the various claims of the refugees, Tories, etc. . . ." In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States.

275, 276 n.1 (1959), this Court emphasized the same point by quoting from M. IRISH and J. PROTHO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1959):

> " 'When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!' "

Chief Justice Marshall in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), similarly recognized the historical connection between the Eleventh Amendment and the States' financial integrity.

> It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed to Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states . . . We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited . . . were persons who might probably be . . . creditors.

Id. at 406.

In *Jordan* I this Court was confronted with the question of whether the Eleventh Amendment deprived the federal

court of jurisdiction to enter a judgment ordering payment directly from the treasury of the State of Illinois, or whether the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), encompassed a judgment for restitution of public aid benefits wrongfully withheld. The court of appeals in *Jordan v. Weaver,* 472 F.2d 985 (7th Cir. 1973), had reasoned that the imposition by a federal court of a liability against the State was not the "touchstone of the Eleventh Amendment's applicability." *Id.* at 991. The ramifications of this decision extended beyond the federal/state grant-in-aid AABD program and might have opened the door to direct monetary judgments against States in federal suits seeking recovery of taxes from state treasuries, suits for damages, and numerous other areas.

The majority in *Jordan I* concluded that the decision of the court of appeals was contrary to the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663. The Court further observed that the decree was "in practical effect indistinguishable in many aspects from an award of damages against the State," *Id.* at 668, and emphasized that if it were to uphold the decree, it would have been necessary for the Court to overrule its holding in *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945). Unwilling to overrule *Ford Motor Co.,* and to countenance damage suits against States in federal court, the Court reversed "that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid . . ." *Id.* at 659.

The Court stressed, however, that it was judging only "the award actually made in this case, and not one which might have been differently tailored in a different case . . . ."

Id. at 665. Further, the Court noted (*Id.* at 667):

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young* will not in many instances be that between day and night.

The limited scope of the *Jordan I* holding is evidenced by subsequent opinions of this Court describing the case as one seeking "damages from the public treasury" (*Scheuer v. Rhodes,* 416 U.S. 232, 238 (1974)), as an "ordinary suit for money damages against the State" (*Milliken v. Bradley,* 433 U.S. 267, 279 (1977)), and as one granting "immunity from retroactive monetary relief." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978). In short, this Court viewed the direct monetary relief in *Jordan I* as falling squarely within the core of the Eleventh Amendment's original purpose to prevent the federal courts from directly intruding upon the treasuries of the States.[12] The notice relief at issue now, however, is both conceptually and factually different from the money judgment awarded in *Jordan I.*[13]

> The form of notice we envisage would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state could be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state.

Jordan v. Trainor, 563 F.2d at 876 (*en banc*).

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[12]Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 682, 687 (1976) ("The operational concept of a sovereign immunity that is secure against judicial inroads has been retained in at least the core area of damage suits.")

The position now presented by the petitioner, one never before embraced by this Court, is that the Eleventh Amendment shields knowing violations of federal law by state officers even where there is no monetary relief sought against the State and where the relief requested respects the institutions of state government. In essence, the petitioner claims, citing only *Jordan I* for support, that Eleventh Amendment immunity sweeps so broadly as to bar federal courts from giving notice to class members as to the disposition of a case and the possibility of further relief through a preexisting state administrative remedy.

The difference between notice relief and a money judgment is fundamental, however, in terms of the Eleventh Amendment's historical protection of the State's fisc. The Eleventh Amendment protects the state's sovereignty by protecting the State fiscally against federal court retroactive monetary awards, thereby preventing unanticipated disruptions of the State's fiscal planning. In order to do so, the Amendment effectively creates a presumption that the State *qua* State does not relinquish this immunity except by explicit waiver - constitutional or statutory. Given this function of the Amendment, for purposes of money judgments to be paid by the State, state officials, acting in their official capacities, may claim the immunity as well,

[13] *Compare* Pub. L. No. 94-574, §1, 90 Stat. 2721 (1976), amending 5 U.S.C. §702 to provide that

> [a]n action in a court of the United States seeking *relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. (Emphasis added.)

insofar as the damage award runs against the State.

But when state officials seek to protect their own illegal actions, and to hide from persons within the State the nature of those actions, or attempt to interpose state sovereignty between injured citizens and available procedures the State *qua* State has set up as a remedy, there is no broad presumption (grounded in the Eleventh Amendment or otherwise) that the State as sovereign needs or wants immunity, even if it were available. With the exception of the money judgment, there is no basis for assuming that the sovereign has any interest in shielding its officials from remedies directed at their illegal actions, or partakes in any way in the illegal action. *See Ex Parte Young, supra.* This is just as true for the notice relief currently at issue as for the portion of the injunction affirmed in *Jordan I.* The State may or may not eventually pay benefits to those class members who choose to assert their rights in the state process. But the State has in no way indicated - and the policies of the Eleventh Amendment in no way presume on behalf of the officials here - that the State wants or is entitled to have its officials who have committed illegal acts cloaked in an immunity solely to block knowledge of and access to a state-created process. The state officials who are attempting to do so are thus wholly on their own, and have no identity with any state sovereignty which is comparable to the identity present when damages are at issue.[14]

[14] An example clarifies this. Assume that Illinois had a property tax system under which assessments were sent out, and the property owner had one year to file an administrative or judicial appeal of the assessment. Assume also that the state assessor notified one group of property owners (*e.g.*, whites) of the appeal right but not another group (*e.g.*, blacks). A federal lawsuit could certainly enjoin that official from such discriminatory practices in future years. On the other hand, the Eleventh Amendment tax cases (see pp. 38-39. *infra*) would presumptively cloak

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Indeed, insofar as the petitioner contends that notice relief is tantamount to a damage award (Pet. Br. 33-34) he is making no useful statements about the nature of the federal court order, which does not award damages; rather, such statements merely indicate his total isolation from the State's own policies and expressions of the scope of its sovereignty, and the remedies it provides for its residents, and underline the official's desire to block access to *State* review of his illegal policy. His fear is not of any intrusion on state sovereignty caused by the federal court order; rather, he fears the rights class members have under state law, rights created by the sovereign to review the official's action. This is a perversion of the Eleventh Amendment; it is an attempt to perpetuate the effects of prior willful illegal acts even though the State *qua* State has no interest in barring the requested relief. In this context, the official's attempt to align himself with the State and its sovereignty must fail. The State has no sovereign interest in barring the relief given; indeed, the remedies to which the class is remitted are those specifically agreed to and adopted by the sovereign State of Illinois for the purpose of ensuring that

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the official, and the State, with immunity from a federal court order for refund of taxes illegally exacted based on an improper assessment. The remaining question would then be - and the question in this case is - whether the official should have any immunity from being required to send a notice to the disadvantaged class of their still extant state rights to challenge the past assessment. The answer must be that the State has no presumptive interest, grounded in the Eleventh Amendment or sovereign immunity, in the official having immunity for the action. The State *qua* State must be presumed to have an interest in its citizens exercising those rights it has given them, and to have interests wholly at odds with an official attempting to interfere in derogation of both federal and state law. The Eleventh Amendment protects state fiscal interests, not illegal state official action.

each public aid recipient receives the benefits to which he or she is entitled. Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977).

Petitioner makes no attempt to demonstrate that it would be consistent with the purposes of the Eleventh Amendment to bar such relief. Instead petitioner merely asserts that if the Eleventh Amendment bars money damages against the State, as held in *Jordan I,* it bars notice relief against state officers, and no reasoned analysis is warranted. This contention is simply too facile.[15] It overlooks the historical and conceptual underpinnings of the Eleventh Amendment, and, if adopted, would result in a perversion of the Eleventh Amendment, "Our Federalism," and the congressional mandate embodied in 42 U.S.C. §1983 against illegal official action.

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[15]As recognized in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 20 (1963),

> The question always has been which suits against officers will be allowed and which will not be. It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of government or because it required him, as in mandamus, to prform an official duty. These as we know had been well established before the Eleventh Amendment as not necessarily requiring consent. To be sure the renewed emphasis on immunity given by the eleventh amendment might conceivably have been taken so to extend the doctrine as to exclude suits against state officers even in cases where the English tradition would have allowed them. There was a running battle as to where the line would be drawn. The amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states. The upshot as we shall see was to confine the amendment's prohibition more or less to the occasion which gave it birth, to wit, the enforcement of contracts and to most (though not all) suits involving the title and disposition of a state's real and personal property.

B. The Principles of Federalism Are the Predominant Consideration in Determining the Scope of the Eleventh Amendment.

Last Term this Court reaffired the premise that it is the "principles of federalism that inform Eleventh Amendment doctrine . . . ." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978). Similarly, in the past, this Court has recognized that decisions interpreting the Eleventh Amendment must be "in accord with the common sense of this Nation's federalism." *Parden v. Terminal Ry. Co.,* 377 U.S. 184, 196 (1964). While the currents of "Our Federalism"[16] have shifted over the last two hundred years,

[16]In *Younger v. Harris,* 401 U.S. 37, 44-45 (1971), this Court defined the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. *What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.* It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. (emphasis added)

the underlying theme of federalism in Eleventh Amendment cases is pervasive.[17] In these cases, the Court has attempted to balance, accommodate, and harmonize the national government's interest in vindicating and protecting federal rights, federal interests, and the supremacy of federal law, with the state government's interest in preventing undue interference with the legitimate activities of the State.

The petitioner does not purport to explain how the notice relief undermines the principles of federalism, or what values of federalism compel the conclusion that "[t]he Eleventh Amendment is a jurisdictional bar to the exercise of a federal court's equitable power to order retrospective notice relief . . . ." Pet. Br. at 11. Instead, the petitioner contends that the test of Eleventh Amendment applicability is whether the relief is "prospective" or "retroactive." Pet. Br. at 26-32. First, neither the language of the Eleventh Amendment nor the intent of the framers supports such a test. Second, and most importantly, there are no principles of federalism that support such a test. Third, as discussed above, this Court has only held that "retroactive" money judgments are barred by the Eleventh Amendment; no other "retroactive" relief has been held to be barred by the Eleventh Amendment. Indeed, the line between "retroactive" and "prospective" relief, recognized in *Jordan I* to be elusive, was blurred in *Milliken v. Bradley,* 433 U.S. 267, 290 (1977), by this Court's approval of court-ordered state payments for compensatory education programs even

[17]*See generally,* Baker, *Federalism and the Eleventh Amendment,* 48 U. COLO. L. REV. 139, 172 (1977) ("Considerations of federalism seem to underlie all aspects of the eleventh amendment . . . Expressly recognizing the central role of federalism would undoubtedly clarify present law."); *LeClercq, State Immunity and Federal Judicial Power-Retreat from National Supremacy,* 27 U. FLA. L. REV. 361 (1975).

though such relief was designed to provide a remedy for the injury to those harmed in the past by the illegal acts of state officials. By analogy in this case, the notices are "part of a plan that operates *prospectively* to bring about the delayed benefits of a [constitutionally administered program]" (*Milliken,* 433 U.S. at 290) by notifying those harmed in the past of available state remedies. In short, the distinction between "retroactive" and "prospective" is flawed.[18]

[18]The differing interpetations of *Jordan I* by each of the members of the Third Circuit panel in *Fanty v. Commonwealth of Pa., Dept. of Public Welfare,* 551 F.2d 2 (3d Cir. 1977), *pet. for cert. pending sub nom. Randle v. Beal,* (No. 76-6853, 1977 Term), highlight the conceptual inadequacies of a prospective/retroactive test as framed by the petitioner. In this case, the trial court ordered state public aid officials to notify members of two subclasses of welfare recipients (a) that they had no legal obligation to continue to reimburse the State from federal disability benefits for welfare benefits already received, and (b) that they may have state administrative remedies to recover such payments already made. Whether such relief is permissible under the Eleventh Amendment divided the Third Circuit in three ways. Chief Judge Seitz interpreted *Jordan I* as establishing the test of "whether the relief operates against the sovereign itself or only against an officer" and, applying this standard, concluded the notice relief was barred by the Eleventh Amendment. *Id.* at 4. Judge Garth reasoned that the decree was in part designed to remedy a past breach of a legal duty and in part to prevent future violations and thus presented a borderline Eleventh Amendment issue. *Id.* at 6. In dissent, Circuit Judge James Hunter III disagreed that the notice relief looks solely to a "past breach of a legal duty" (*Id.* at 10) and thus concluded that the notice relief was a "necessary consequence of compliance in the future with a substantive federal question determination" (quoting *Jordan I* at 668) and therefore not barred by the Eleventh Amendment. Petitioner's reliance on the Third Circuit's holding in *Fanty* as "persuasive authority" (Pet. Br. at 39) is, to say the least, questionable. Moreover, since the notice relief in *Fanty* in part was necessary solely as a "prospective" remedy, *Fanty* underlines the additional question of whether, where notice is a part of prospective relief, the Eleventh Amendment bars a court from placing any statement about existing state remedies for past injury onto a notice which the federal court otherwise clearly has the power to order state officials to distribute.

Labeling relief "prospective" or "retroactive" neither frames the issue properly nor answers the issue. *See Turner v. Walsh,* 435 F. Supp. 707, 715 n.9 (W.D. Mo. 1977), *aff'd* 574 F.2d 456 (8th Cir. May 3, 1978). Furthermore, there is no cogent rationale why such a distinction, even if it could be made, should be decisive in interpreting the scope of the Eleventh Amendment.

To the petitioner any injunctive relief requiring state officials to take action in light of past illegality is "designed to *remedy* the denial" (Pet. Br. 26), and "essentially compensatory" (Pet. Br. 33), and therefore barred by the Eleventh Amendment. However, the cardinal principles of our legal system are predicated upon providing relief for past breaches of legal duties. Cases that are not "designed to *remedy* [past] denial" or be "essentially compensatory" are normally not ripe for adjudication. The contention that the Eleventh Amendment bars all relief against state officials that has any remedial effect on past action sweeps far beyond *Jordan I* and the intended purpose of the Eleventh Amendment.[19] Accordingly, respondents submit

[19]From another perspective, the federal courts have always been capable of not merely enjoining officials from future violations of the law, but affirmatively mandating state officials to provide revised or substitute procedures for persons previously injured. Where, for example, a person has been injured in the past by a legally deficient or non-existent state administrative hearing system, such as in a termination or suspension from employment, the courts have been free to affirmatively order state officials to give a hearing. *E.g., Perry v. Sindermann,* 408 U.S. 593, 603 (1972). So long as there is no federal monetary award and the State remains free to limit or deny monetary compensation in the federally-mandated but state-instituted procedure, the Eleventh Amendment is not implicated.

that while this Court has at times labeled certain relief "prospective" or "retroactive," these labels do not enlighten Eleventh Amendment analysis. A review of Eleventh Amendment cases points instead to a test that stresses considerations of federalism.

In the seminal Eleventh Amendment decision, *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 737 (1824), in which the plaintiff sued a state officer to recover a tax levied by the State of Ohio against the Bank of the United States, before ruling on the jurisdictional objections that the suit was against the State and therefore barred by the Eleventh Amendment, Chief Justice Marshall noted the need to

> pause for a moment and reflect on the relative situation of the Union with its members, should the objection prevail. A denial of jurisdiction . . . asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States.

Id. at 847. Recognizing the principles of federalism at stake, Chief Justie Marshall rejected the applicability of the Eleventh Amendment shield and held that a state officer could be sued in law and equity for wrongs done or threatened, when his acts were defended on the basis of official but constitutionally defective authorization.

After the Civil War, with the onset of civil rights jurisdiction as established in the various Civil Rights Acts, and also with the adoption of federal question jurisdiction in 1875, the question of the scope of Eleventh Amendment immunity was repeatedly addressed by the Supreme Court. In no case in which the Eleventh Amendment was held to be a bar, did the plaintiffs seek relief that was compatible with federalism or, in other words, in every case in which the Eleventh Amendment was held to be a bar, the relief sought

involved a significant intrusion into the legitimate activities, and particularly the fiscal activities, of the State. *See generally,* Liberman, *State Sovereign Immunity in Suits to Enforce Federal Rights,* 1977 WASH. U.L.Q. 195; Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1 (1972).

For example, in *Louisiana v. Jumel,* 107 U.S. 711 (1882), the plaintiffs were seeking to require the appropriation of certain funds for the payment of interest due on the bonds of the State of Louisiana which they held, as well as the collection of certain taxes and the application of the proceeds to the interest and principal of the bonds.

> The remedy sought, in order to be complete would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal, and interest were paid in full . . . . It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.

Id. at 727-728. *Louisiana v. Jumel* constituted a turning point in Eleventh Amendment cases, and thereafter, in cases brought by holders of bonds seeking direct financial relief against the State, the Court repeatedly rejected their claims as barred by the Eleventh Amendment. *Hagood v. Southern,* 117 U.S. 52 (1886); *Ex Parte Ayers,* 123 U.S. 443 (1887); *Hans v. Louisiana,* 134 U.S. 1 (1890); *North Carolina v. Temple,* 134 U.S. 22 (1890).

Judicial interpretation of the Eleventh Amendment entered a new phase with the advent of the railroad rate cases, beginning in 1894 with *Reagan v. Farmers Loan & Trust Co.,* 154 U.S. 362 (1894), and culminating 14 years later with the landmark case of *Ex Parte Young,* 209 U.S.

123 (1908). In *Ex Parte Young* this Court held that the Eleventh Amendment did not bar a suit in federal court against a state Attorney General to enjoin him from enforcing an allegedly unconstitutional state statute establishing railroad rates.

> And again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn v. The Bank of the United States* up to the present; the only difference in regard to the case of *Osborn* and the case at hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* case, an actual and direct trespass upon or interference with tangible property. . . . The difference between an actual and direct interference with property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of interference with property, the person enjoined is assuming to act in his capacity as an official of the state and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature . . . . The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States.

Id. at 167.

The next significant group of Eleventh Amendment cases were those brought to recover taxes pursuant to state-created causes of action for refund of taxes illegally exacted. *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47 (1944); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945); and *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946). These cases all involved the core concern of the Eleventh Amendment, protecting the State from a direct monetary liability imposed by the federal court. As stated in *Kennecott Copper Corp., supra*:

> These cases [*Ford Motor Company* and *Read*] declare the rule that clear declaration of a state's consent to suit against itself in the federal court on *fiscal claims* is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford Motor Co.* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances.

Id. at 577. (emphasis added)

Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279 (1973), also fits squarely within the body of Eleventh Amendment cases in which plaintiffs were seeking a direct monetary judgment against a State. The plaintiffs, employees of state hospitals and other facilities, brought suit for a direct monetary judgment against the State for overtime pay under the Fair Labor Standards Act, 29 U.S.C. §216. In reviewing the legislative history of the FLSA, the Court found no congressional intent to deprive a State of its immunity from a suit in federal court seeking a direct judgment of monetary liability against the State. In reaching this conclusion, the Court noted: "We are reluctant to believe that Congress in pursuit of a *harmonious federalism* desired to treat the States so harshly." *Id.* at 286. (emphasis added)[20]

[20]The concurring opinion in *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare,* 411 U.S. 279, 287 (1973) (Marshall and Stewart, JJ.), concluded, based on limitations inherent in Article III, that the plaintiffs could only enforce their federal rights in state courts, "a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." *Id.* at 298. This result is precisely what respondents here seek.

In summary, then, there is no case cited in the *Jordan I* decision, or in the petitioner's brief, in which the Eleventh Amendment has been held to be a bar to relief against state officers where the relief was not a significant intrusion upon the integrity of the state government as sovereign. Thus the critical question in determining whether a suit against a state officer is barred under the Eleventh Amendment turns on whether the relief respects the integrity and independence of state institutions; if so, the relief is not barred by the principles of sovereign immunity embodied in the Eleventh Amendment.

Moreover, to the extent that there are federal interests, such as federal institutions, funds, or programs, there is an added reason in our federal system for the federal courts to vindicate federal rights, but, as always, in a manner consistent with "Our Federalism." For example, in this particular case involving a cooperative federal/state grant-in-aid program, and federal funds, statutes and regulations, there are obviously important nationwide interests in insuring enforcement of federal law. *Jordan I,* 415 U.S. at 688-696 (Marshall and Blackmun, JJ., dissenting.) No such federal interests are presented in cases such as the tax cases of the 1940's or the bond cases in the latter part of the 19th century. This case, then, presents to the Court for the first time the question whether the Eleventh Amendment bars relief against state officers which (1) harmonizes the federal-state interests, (2) does not intrude upon state sovereignty, (3) reserves to the state courts the ultimate determination of liability, and (4) respects the state's institutions to determine matters of fiscal concern to the state.

Precisely such relief has already been approved by this Court in *Sterrett v. Grubb,* 400 U.S. 922 (1970), *aff'g mem.* 315 F. Supp. 990 (N.D. Ind. 1970). *Grubb* involved a class

action in which the court held that a statewide welfare regulation was contrary to the Social Security Act and therefore invalid under the Supremacy Clause. In connection with the claim of the members of the plaintiff class for restitution of benefits wrongfully denied, the court noted that federal law required all states participating in the AFDC program to provide for administrative appeals and hearings within the state public aid department, and to provide for corrective payments retroactive to the date the incorrect action was taken when an appeal was decided in favor of the claimant.[21] In view of these federal requirements, the Court remanded the claim for back benefits to the Indiana Department of Public Welfare in light of the court decision and the applicable regulations of the Department of Health, Education and Welfare. Further, the court required the members of the plaintiff class injured by the illegal state regulations to be notified they could appeal the denial of benefits.[22]

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[21]This mandatory provision is now found at 45 C.F.R. §205.10 (a)(18) (1977).

[22]It is also considered, ordered, adjudged and declared that the Indiana State Department of Public Welfare, its officers, employees and agents, shall, on or before 60 days of the date of this opinion, notify by first-class mail to his or her last known address, the named plaintiffs and all members of their class whose application for AFDC assistance has been denied or whose AFDC assistance has been terminated pursuant to Indiana's 'stepfather' regulation, MANUAL III-C-3, after August 8, 1968, and who was not at the time of such denial or termination determined to be otherwise ineligible for such assistance, that the "stepfather regulation" has been invalidated and that they may reapply for AFDC assistance. Such written notice must also inform these applicants and previous recipients that they may appeal at any time within 60 days of the date of such notice the denial or termination of AFDC assistance for the period during which it was denied, and such notice shall include a form returnable to the State department upon which such claimants may indicate their desire to appeal.

Grubb v. Sterrett, 315 F. Supp. 990, 996 (N.D. Ind. 1970).

Subsequent to this decision of the three-judge court, the state defendants moved to vacate the judgment and challenged, *inter alia,* the relief which they characterized as requiring lump sum retroactive payments. In rejecting this contention, the three-judge court stated:

> This court did *not* enter a money judgment against the State of Indiana. Rather, it remanded the claims of members of plaintiff class for retroactive payment of wrongfully withheld welfare assistance for determination by the Indiana DPW in accordance with its already-established procedures. This court did impose some specific additional requirements as to the *procedure* by which the Indiana DPW was to consider such appeals as may be taken. These procedural requirements were necessary under the facts and circumstances of this case in order to inform members of plaintiff's class of this decision and their rights and privileges thereunder. The imposition of these procedural requirements was within the broad remedial power of federal courts to grant supplemental relief which is necessary to give meaningful effect to their judgments and decrees. *See, e.g., Sullivan v. Little Hunting Park, Inc.,* 90 S. Ct. 400, 405 (1969).

Grubb v. Sterrett, Civ. No. 69 F 3, Memorandum and Order (N.D. Ind. June 8, 1970) (emphasis in original) (unpublished) (attached to brief of Plaintiffs-Appellees in the Seventh Circuit). The state defendants then appealed to this Court from both the original decision and the unpublished Memorandum and Order dated June 8, 1970. This Court summarily affirmed. 400 U.S. 922 (1970). This summary affirmance was left undisturbed by *Jordan I* and, understandably so, in light of the wholly different issues of federalism presented by the notice remedy approved in *Grubb,* in contrast to the direct money judgment against the

State disapproved in *Jordan I.*[23] See *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458 (1976) (Stevens, J., concurring in the judgment). *See also Doe v. Gillman,* 479 F.2d 646 (8th Cir. 1973), *cert. denied,* 421 U.S. 920 (1975).[24]

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[23]Virtually the identical remedy approved in *Grubb* had already been affirmed by this Court in *Solman v. Shapiro,* 300 F. Supp. 409 (D. Conn. 1969), *aff'd mem,* 396 U.S. 5 (1969). In this class action, the trial court found provisions of Connecticut law regarding the income of stepfathers to be contrary to the federal requirements under the AFDC program and enjoined the continued enforcement of state law. In addition to injunctive relief, plaintiffs sought recovery of benefits wrongfully withheld pursuant to the voided state law. After noting that federal law required state public aid departments to make corrective payments, and that Connecticut law so provided, the court concluded:

> Since the state welfare agency has already established a procedure whereby retroactive damages for payments wrongfully withheld may be determined, the petitioner's prayer for damages is remanded to the Connecticut Department of Welfare for its determination in light of this decision and the applicable regulations of the United States Department of Health, Education and Welfare and Connecticut Department of Welfare. See *Robinson v. Washington,* 302 F. Supp. 842 (D.D.C., Nov. 18, 1968).

Solman v. Shapiro, 300 F. Supp. at 416.

[24]In *Doe* the district court had ordered the defendant Director of the Iowa Department of Public Aid to send notice to class members denied benefits for a two-year period preceding the date of the judgment that they were now eligible for benefits, and further ordering the defendant to make retroactive payments. *Doe v. Gillman,* 347 F. Supp. 483 (N.D. Iowa 1972). On appeal the defendants argued, *inter alia,* that the relief ordered by the trial court was barred by the state's Eleventh Amendment immunity from suit. In analyzing this Eleventh Amendment defense, the Eighth Circuit first noted that the Iowa Department of Public Aid regulations specifically required the payment of retroactive benefits in state administrative hearings. It then stated: "We can only assume that the defendants will follow their own regulations and retroactive payments will be made. See *Grubb v. Sterrett,* 315 F. Supp. 990, 995-996 (N.D. Ind. 1970), *aff'd* 400 U.S. 922." *Doe v. Gillman,* 479 F.2d at 649. On this basis, the Eighth Circuit concluded that it was unnecessary for the federal court either to decide the Eleventh Amendment issue or to

The notice relief upheld in *Sterrett v. Grubb, supra,* and subsequent to *Jordan I,* ordered in *Morris v. Houston,* G-250-73 C.A. (W.D. Mich. Oct. 18, 1974),[25] and *Herweg v. Ray,* No. 77-222-1, ____ F. Supp. ____ (S.D. Iowa July 10, 1978), and similarly approved by the Seventh Circuit *en banc,* shifts to the state administrative apparatus the burden of determining the rights, and liabilities, if any, of the parties. It preserves "the right of a state to reserve for its courts the primary consideration of its own . . . [monetary] litigation because of the direct impact of such litigation upon its finances." *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577 (1946). There can be no doubt that this relief promotes the notions of cooperative federalism embodied in both the federal/state grant-in-aid program, and in the Eleventh Amendment.[26] The petitioner, however,

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order the defendants to pay back benefits and thus vacated the lower court decree so ordering. On the other hand, the provision in the district court decree requiring notice to all persons denied benefits for the two-year period prior to the decree was upheld. *Accord, Lewis v. Shulimson,* 534 F.2d 794 (8th Cir. 1976), *cert. denied* 430 U.S. 940 (1977) *pet. for reh. denied sub nom. Gourley v. Lewis,* 431 U.S. 934 (1977).

[25]In *Morris v. Houston,* G-250-73 C.A. (W.D. Mich. 1974) (R. Vol. IV, Item 36, Attachment), *rev'd on other grounds,* 516 F.2d 902 (6th Cir. 1975) (table), Chief Judge Fox interpreted *Jordan I* and the Eleventh Amendment as allowing notice relief to welfare recipients denied benefits in violation of federal law - "the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits." *Id.* at 15-16.

[26]Because the notice relief is not an award of damages, it is enforceable by means of the contempt power against the state officials to the extent - and only to the extent - that notice is not sent. Thus the problems alluded to in *Jordan I* in enforcing money judgments against the State are not presented by notice relief. *Alabama v. Pugh,* 46 U.S.L.W. 3802 (July 3, 1978). If the state officials refuse to make payments after losing either an administrative appeal or state court decision, they would not be in contempt of the federal court judgment. The only remedy of the respondents would be in the state courts.

simply ignores this reality. Cooperative federalism cannot mean that state welfare officials can knowingly violate federal welfare laws, and avoid any accountability to the needy persons injured by their actions.[27] By upholding the notice relief in this case, this Court harmonizes the interests of both State and National Governments and, at the same time, respects the principles of federalism embodied in the Eleventh Amendment. This interpretation of the Eleventh Amendment is identical to that reached in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 28-29 (1963):

> It has been the burden of this article from the beginning that the so-called doctrine of sovereign immunity has never excluded judicial action simply because the enforcement of state policy was involved. . . . Where the enforcement of state policy threatens federal instrumentalities or federal programs or is in defiance of constitutional inhibitions (other than obligation of contract), *Osborn* and *Ex Parte Young* are the prototypes. One teaches that intervention does not

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[27]Personal liability of state officers is clearly not a realistic remedy for public aid recipients deprived of benefits to which they are entitled. First, federal funds available to states for corrective payments, 45 C.F.R. §205.10(b)(2) (1977), could not be used to satisfy a personal judgment against a state officer. Second, public aid officers are unlikely to be persons of sufficient means to make personal liability a viable remedy for the many needy persons who are affected by their decisions, and meeting the basic subsistence needs of the poor should not turn on the financial condition of state officers. Third, the immunity of public officers, although not absolute, is quite extensive since the range of their discretion is broad, and in few areas of welfare law will the test be satisfied whether they knew or should have known, that their actions were contrary to the Supremacy Clause. Even in the instant case, where the state officers knew that state regulations were contrary to federal law, the first two considerations unquestionably compel the conclusion that individual liability is not a sensible or realistic remedy for members of the plaintiff class.

violate the eleventh amendment; the other teaches that intervention may take effective forms even when it thereby imposes control on the higher centers of state officialdom.

This approach to Eleventh Amendment problems is also entirely consistent with *Jordan I.* Notice of the availability of possible relief through existing state administrative remedies, where the state agency, and state courts, would be the sole arbiters of whether any monetary relief would be granted, respects the limited role of federal courts in our system, and at the same time provides remedies for violations of federal law and thereby insures governmental accountability. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1, 55, 59-60 (1972).

Finally, this interpretation of the Eleventh Amendment is consistent with the federal court's historic equitable role in tailoring and providing relief for violations of federal law. Petitioner makes repeated references to the fact that the members of the plaintiff class were injured years ago and any recovery by them in a state administrative hearing will not necessarily relate to present need for benefits. (Pet. Br. at 25, 29, 34) This argument confuses equitable jurisprudence with Eleventh Amendment jurisprudence. LeClercq, *State Immunity and Federal Judicial Power - Retreat from National Supremacy,* 27 U. FLA. L. REV. 361, 373 (1975). Respondents concede that there will be cases in which public aid officials are found to have violated provisions of the Social Security Act, but federal courts in the exercise of their equitable discretion will decline to require notices. *See, e.g., Owens v. Roberts,* 377 F. Supp. 45, 60-61 (M.D. Fla. 1974) (Per Curiam Decision on Motion to Amend Judgment); *cf., City of Los Angeles v. Manhart,* 98 S. Ct. 1370 (1978). In this case, however, petitioner did not present any equitable

defenses in the courts below, and has only presented to this Court the Eleventh Amendment jurisdictional issue. Moreover, in view of the intentional violations of federal law in this case, the equities certainly tip in favor of the respondents, and providing equitable relief is in furtherance of the federal court's obligations under Section 1983 to provide redress for individuals whose federal rights are violated.

III.

THE NOTICE RELIEF FULFILLS THE COURT'S DUTY, UNDER SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871, TO VINDICATE FEDERALLY SECURED RIGHTS WITHOUT UNREASONABLY INTRUDING UPON STATE SOVEREIGNTY.

No interpretation of the Eleventh Amendment, and the principles of federalism "that inform Eleventh Amendment doctrine" (*Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978)) may be made in this case without also taking into account the principles of federalism embodied in Section 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. §1983. For this provision was enacted by Congress to provide an effective federal remedy for infringement of federal rights by state officers, exactly as occurred in this case. The notice relief approved by the court below fulfills the purpose of Section 1983 by vindicating the federal rights of the respondents. At the same time such relief harmonizes considerations of federalism and comity by respecting the petitioner's legitimate sphere of independence in the administration of Illinois' public assistance programs. To reverse the court of

appeals in this case in deference to petitioner's ill-defined and distorted notions of federalism and state sovereignty would emasculate the remedial purposes of Section 1983.

A. Petitioner's Intentional Violation of Federal Law Falls Squarely Within the Ambit of Section 1983.

Beginning with its decision in *King v. Smith*, 392 U.S. 309 (1968), this Court has consistently recognized that Congress, by statute, and HEW, by regulations, have conferred upon the recipients of federal-state categorical assistance programs certain guarantees.[28] The Court has repeatedly held that state welfare officials may not subvert these protections without running afoul of the superior position federal law has been accorded by the Supremacy Clause of the Constitution, Art. VI, cl. 2. *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Prior to the time this lawsuit was filed, the director of the Illinois Department of Public Aid knew full well that federal law required him to act upon respondents' AABD applications within specified time periods, and that benefits to eligible applicants were to be effective as of the last day of the relevant time limit. (A. 37a-39a) "[W]ilfully and in gross disregard of the rights of eligible AABD applicants" (A. 38a), he enforced his own illegal regulations, which had already been held "null and void" by a three-judge federal

[28] *See generally* M. REAGAN, THE NEW FEDERALISM, 54-97 (1972).

court. *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (Judgment entered October 1970, ¶7) (R. Vol. I, Item 9, Exh. B).

Relying upon its earlier decision in *Rosado v. Wyman*, 397 U.S. 397 (1970), this Court held in *Jordan I* that respondents had properly invoked §1983 as a basis for obtaining relief against petitioners' enforcement of state regulations which directly contravened the requirements of the Social Security Act. 415 U.S. at 675.[29]

The relief developed by the courts below is also consistent with the purposes of §1983, when viewed in light of the legislative history surrounding the enactment of §1983 as set out by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961), and *Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978).

Enacted as §1 of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, §1983 by its terms protects a "party injured" against any "person who, under color of any statute . . . [or] regulation of any State" infringes upon "any rights, privileges, or immunities secured by the Constitution and laws," and provides for relief in the federal courts to the party injured "in any action at law, suit in equity, or other

[29] In this case, petitioner deprived respondents of a right which this Court has deemed to be "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Article VI, cl. 2...." *Douglas v. Seacoast Products Inc.*, 431 U.S. 265, 272 (1977); *see also Hagans v. Lavine*, 415 U.S. 528, 549 (1974); *Perez v. Campbell*, 402 U.S. 637, 644 (1971). However, even if viewed solely as a violation of the Social Security act, respondents' action lies squarely within §1983's protection of rights secured by federal law, a dimension of the statute added in 1874. See *Flagg Bros., Inc. v. Brooks*, 98 S. Ct. 1729 (1978); *Mitchum v. Foster*, 407 U.S. 225, 239 n.30 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7, 548 n.15, 549 n.16; *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966).

proper proceeding for redress." This legislation and the other Reconstruction legislation marked a sharp departure from the manner in which this country had previously viewed the task of enforcing the civil rights of its citizenry.[30] The systematic infringement of federal rights by state officials prompted the Congress to provide for remedies in the federal courts to insure the supremacy of federal law, its enforcement, and its protections.[31] *See Mitchum v. Foster,* 407 U.S. 225, 238-239 (1972).

Section 1983 was a key element in this expansion of federal power. Its purpose was to combat the refusal or

[30]Prior to the Civil War and Reconstruction, state governments were accorded a position of preeminence in the economic and political life of the nation. Control over the definition and enforcement of civil and other rights was retained by the states and state officials as part of their responsibility to exercise "police powers" to preserve the health, welfare and safety of the people. The national government was viewed as the repository of limited powers conferred upon it by a consensus of the states. *See Developments in the Law - Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1138-1141 (1977) (hereinafter "*Developments*"); H. HYMAN, A MORE PERFECT UNION, 7-10 (1973); W. BENNETT, AMERICAN THEORIES OF FEDERALISM 91-159 (1964). The Civil War and the turbulent period of recalcitrance on the part of the South which followed, however, led to a reordering of the pre-War allocation of federal-state responsibility. Moreover, numerous federal statutes were passed to further promote and ensure the transition of black men and women from slaves to whole members of society. For example, the Freedman's Bureau Acts of 1865 and 1866, Ch. 90, § §1-5, 13 Stat. 507, and Ch. 200, § §1-15, 14 Stat. 173, much like present-day public assistance programs, sought to secure a minimum level of employment, health care and education for the disadvantaged black citizens of the nation. M. KONVITZ, A CENTURY OF CIVIL RIGHTS, 43-47.

[31]This machinery included the enactment of the various civil rights statutes, the expansion of federal removal and habeas corpus authority, and the establishment of federal question jurisdiction. *See Developments, supra* n.30 at 1147-1149; Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876,* 13 AM. J.L. HIST. 333 (1969).

inability of state officials and the state courts to enforce federal rights by "open[ing] the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 239; *see Monell v. Department of Social Services* 98 S. Ct. 2018, 2032-2035 (1978); *Steffel v. Thompson,* 415 U.S. 452, 453-473 (1974); *McNeese v. Board of Education,* 373 U.S. 668, 671-672 (1963); *Monroe v. Pape,* 365 U.S. 167, 172-187 (1961). "[M]oreover, there can be no doubt that §1 of the Civil Rights Act was intended to provide *a remedy, to be broadly construed,* against all forms of official violation of federally-protected rights." *Monell,* 98 S. Ct. at 2041 (emphasis added).[32] The director of the Illinois Department of Public Aid in the present case nevertheless claims that he may use the Eleventh Amendment to provide a constitutional bar to the very remedies Congress intended federal courts to provide in Section 1983 cases.

[32]A broad construction of the Act is mandated by its legislative history. In the words of Representative Shellabarger, the author of the legislation and its manager in the House of Representatives:

> This act is remedial and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people . . . Chief Justice Jay and also Story say:
>
> > "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally...." 1 *Story on Constitution,* sec. 429.

CONG. GLOBE, 42d Cong., 1st Sess., App. at 68 (1871), as quoted in *Monell,* 98 S. Ct. at 2032-2033.

Petitioner's position could not be more directly at odds with the intent of the Congress that enacted §1983. As this Court only last Term observed, after reviewing the extensive legislative history of the Act, "everyone [in Congress]—proponents and opponents alike—knew §1983 would be applied to state officers and nonetheless stated that §1983 was constitutional . . ." *Monell,* 98 S. Ct. at 2041. That Congress intended the federal courts to tailor relief so as to redress the deprivation of federal rights is indicated by the contrast between the sweeping language relating to remedies found in Section 1 of the Civil Rights Act of 1871 and the language found in Sections 2 and 6 of the Act expressly limiting relief to damages.[33] As stated in *Monroe v. Pape*, 365 U.S. 167, 178 (1961), "It was precisely that breadth of the remedy which the opposition emphasized." Such remedy would be utilized (1) to override state laws, (2) to provide a remedy where state law was inadequate, and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (*Id.* at 174), the later being the precise situation now before the Court.

Petitioner relies (Pet. Br. 26) heavily on the dictum in *Jordan I* that while "a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex*

[33] "As to the civil remedies for a violation of these privileges . . . the injured party should have an original action in our Federal courts so that by *injunction* or by the recovery of damages he could have relief . . . ." CONG. GLOBE, 42d Cong., 1st Sess. at 501 (Frelinghuysen) (emphasis added).

Parte Young . . . ." 415 U.S. at 677. While the original injunction in *Ex Parte Young* involved "prospective" injunctive relief, nothing in that opinion suggests that the federal court's remedial power, consistent with the Eleventh Amendment, is "*necessarily*" so limited. Moreover, there is no discussion in *Ex Parte Young* of the policies embodied in Section 1983. Further, there is certainly no support either in the language or the legislative history of §1983 to support a prospective/retroactive distinction in regard to relief against state officers. Both the language and the legislative history point to the conclusion that Congress intended to provide the federal courts with broad discretion to tailor remedies against state officers to redress the deprivation of federal rights. Not once in all of the discussions surrounding the enactment of the 1871 Civil Rights Act did any Congressman or Senator suggest that the Eleventh Amendment or state sovereignty generally would operate to restrict the remedy under §1983 against state officers. The absence of such an objection is significant. For the Congress of 1871 certainly was sensitive to the constitutional implications of the bill it was considering, and particularly the extent to which the Act would impinge upon the notion of sovereignty which underlies the independence of state government.[34]

The congressional debates concerning §1983 reveal that the Congress of 1871 did not consider a state officer's actions to be an expression of state sovereignty, deserving of protection, where the officer, like the director of public aid in the present case, violated federal law and the

[34] *See Monell v. Department of Social Services*, 98 S. Ct. 2018, 2031 (1978).

Supremacy Clause,[35] and, in doing so, also transgressed the requirements of state law pertaining to the administration of his office. Obviously, such a course of conduct is as offensive to the sovereignty of the State as it is to the federally secured rights which are violated. In fact, the history of the Civil Rights Act demonstrates that the principal aim of Congress in enacting §1983 was to curb exactly this kind of abuse of authority by state officials. *Monroe v. Pape,* 365 U.S. at 174.

With this historical background, Congress could not have intended to permit state officers to raise the shield of the Eleventh Amendment to deny a remedy to persons whose federal rights were violated except in those few cases where the relief was a substantial and unwarranted intrusion upon the sovereignty of the State.[36] *Cf. Zwickler v. Koota*, 389

[35]A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts.

CONG. GLOBE, 42d Cong., 1st Sess. App. at 314 (1871) (Burchard)

We must remember that it was States' rights, perverted I admit from their true significance, that arrayed themselves against the nation and threatened its existence . . . . Federal laws and federal rights must be protected whether domestic laws are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land.

CONG. GLOBE, 42d Cong., 1st Sess. at 502 (Frelinghuysen).

[36]As noted in *Steffel v. Thompson*, 415 U.S. 452, 464 n.13 (1974):

"Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer entrusted to the enforcement of state agencies." F. Frankfurter and J. Landis, The Business of the Supreme Court 64 (1928).

U.S. 241 (1967); *Mitchum v. Foster*, 407 U.S. 225 (1972). Certainly the burden must fall on the state officer to establish (1) a substantial justification why his actions should be *pro tanto* the State's and, therefore, sheltered by its immunity, (2) that it would be consistent with the congressional intent in enacting §1983 for the state officer to invoke the State's sovereignty, and (3) how the relief sought is antagonistic to the sovereign immunity principles embodied in the Eleventh Amendment. In *Jordan I*, this Court held that the state officers satisfied that burden because money damages against the State were unquestionably the central concern of the framers of the Eleventh Amendment and such relief strikes at the heart of the sovereign's independence. The petitioner here never satisifes this burden nor explains how his position comports with the principles of §1983, the Eleventh Amendment, or the interests of the state or federal sovereigns.

The notice relief presently before the Court, however, falls within the core of the relief which Congress intended federal courts to provide against state officers, and in no way can the notice relief be construed as antagonistic to the intent of the framers of the Eleventh Amendment or antagonistic to the principles of the sovereign's immunity. Just as the original violation of federal law in this case was caused by an individual state officer, without the imprimatur of the state legislature or the State, the relief is directed at an individual state officer, and not at the State.[37]

[37]In light of the fact that the relief approved by the court of appeals *en banc* is directed at state officers, not at the State, it is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in §1983 to provide for relief directly against States, as it did against municipalities. *Compare Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978). On the question of whether "person" as used in Section 1983, included States, as "bodies politic" (Act of Feb.

The judicial decree, as modified by the court of appeals, to send notices to members of the plaintiff class merely requires the state officer to fulfill his ordinary duties under federal and state law to public aid recipients in cases of reduction of assistance. If the state officer were to refuse to send such notices, the order may be enforced by the usual contempt powers of the court directed at the state officers, not at the State. *Alabama v. Pugh*, 46 U.S.L.W. 3802 (July 3, 1978). Such enforcement, if necessary, would not result in a clash between the sovereign State of Illinois and the federal court.

The record in the present case, therefore, presents exactly the type of conduct that most directly prompted enactment of §1983. Federal law concerning the processing and initial payment of AABD benefits was unambiguous. The State, in its sovereign capacity, required those administering its public assistance programs, including AABD, to adhere to federal requirements with respect to decisions on applications for assistance. Yet petitioner, "by reason of prejudice, passion, neglect, intolerance or otherwise," (*Monroe*, 365 U.S. at 180) enforced his own regulations, which operated to reduce the amount of assistance received by respondents, in direct violation of the property rights conferred upon them by the

25, 1871, ch. 71, §2, 16 Stat. 43), see *Munn v. Illinois*, 94 U.S. 113, 124-26 (1876); *Keith v. Clark*, 97 U.S. 454, 459-461 (1878); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 475-76 (1857) (Grier, J., concurring). In examining the legislative history of §1983, it would be unreasonable to insist upon express legislative intent to override Eleventh Amendment State immunity since it was not until 1890, some nineteen years later, that this Court extended the State's Eleventh Amendment immunity to suits brought in federal courts by citizens against their own States. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Social Security Act. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). The lower court's injunction requiring petitioner to afford respondents the notice to which they are entitled under both federal and state law is exactly the kind of relief which fulfills the policies and purposes behind §1983, and is consistent with this nation's federalism.

B. Once Having Found a Violation of Federal Law, the District Court Had a Duty Under Section 1983 to Fashion Relief Which Vindicated Respondents' Federal Rights, Without Unnecessarily Intruding upon State Sovereignty.

This Court has consistently held that where a plaintiff demonstates that his or her federal rights have been violated, the federal courts have a duty to shape relief which will provide the plaintiff with a remedy for the wrong done. *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Brown v. Board of Education*, 349 U.S. 294 (1955).[38] This duty necessarily follows from the "paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel v. Thompson*, 415 U.S. 452, 473 (1974); *see Hicks v. Miranda*, 422 U.S. 332, 353 (1975) (Stewart, J., dissenting). The manner in which relief is formulated has, in

[38]This is a principle which has remained constant throughout our constitutional history. *See Bell v. Hood*, 327 U.S. 678, 684 (1946): "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citing, *inter alia*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).)

large part, been left to the creative discretion of the lower courts — equitable remedies being "a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1973). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad." *Swann,* 402 U.S. at 15; see also *Hutto v. Finney,* 46 U.S.L.W. 4817, 4819, n.8 (June 23, 1978).

The equitable powers of the federal courts, however, are not without limits in suits against state officers. Perhaps the most important restriction stems from the concept of federalism and its recognition of the dual sovereignty upon which our system of government is premised. Particularly since its decision in *Younger v. Harris,* 401 U.S. 37 (1971), this Court has emphasized that in fashioning remedies to vindicate federal rights, the federal courts must not ignore the constitutional significance of independent state government, nor may they frustate the States' ability to function within their legitimate spheres of authority. In *Younger,* the Court stressed the need to maintain

> a system in which there is sensitivity to the legitimte interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. Although it is often difficult to delineate the bounds of legitimate state activity, the Court's decision in *Younger* and its progeny makes clear that its basic concern has been to harmonize the state government's interest in remaining free from unnecessary and unwarranted federal intrusion and the national government's interest in insuring the

protection of federal rights.

Although *Younger* and its progeny are concerned with the threshold problem of whether federal issues are to be litigated in state or federal court, this Court has held that the interests of comity and federalism which underlie *Younger* are also to play a critical role in the formulation of relief, consistent with the Eleventh Amendment, in a case such as this which is properly brought in the federal court. *Hutto v. Finney,* 46 U.S.L.W. 4817 (June 23, 1978); *Milliken v. Bradley,* 433 U.S. 267 (1977).[39] In *Milliken,* the Court established a three-pronged standard against which equitable relief fashioned in the context of §1983 litigation is to be measured.

> In the first place, . . . the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the condition alleged to offend the Constitution . . .'. Second, the decree must indeed be *remedial* in nature, that is, it must be *designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'.* Third, the federal courts in devising a remedy must *take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.*

Id. at 280-281 (citations omitted; emphasis added).

[39]Indeed, a number of commentators have convincingly argued that the reconciliation of federal and state authority, in the context of federal question litigation, can be more effectively accomplished in the selection of an appropriate remedy, rather than at the threshold stage of forum-selection, as is mandated by *Younger. See* Weinberg, *The New Judicial Federalism,* 29 STAN. L. REV. 1191 (1977); *Developments, supra,* n.30 at 1175-1190; Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 STAN. L. REV. 661, 706-23 (1978).

The task of devising relief which satisfies each of the three tests set out in *Milliken* — thereby vindicating federal rights that have been compromised by state officials, while at the same time accommodating the sovereignty of the State and according its officers the latitude necessary "to perform their separate functions in their separate ways," (*Younger v. Harris*, 401 U.S. at 44) is a difficult one. It has been termed "the central paradox of our judicial federalism."[40] Nonetheless, the respondent submit that the notice relief fashioned by the district court, as modified by the court of appeals, is exactly the kind of creative and effective remedy, which accomodates the competing interests of our federal system, and which is sensitive to "the legitimate interests of both State and National Governments . . .," *Younger,* 401 U.S. at 44; *see Hicks v. Miranda,* 422 U.S. 332, 353 (1975) (Stewart, J., dissenting). Such notice relief is a carefully tailored remedy which neither collides with principles of sovereign immunity or federalism embodied in the Eleventh Amendment nor leaves class members whose rights have been violated in the dark about a possible state remedy.

Moreover, the notice relief comports with each of the three factors enumerated in *Milliken, supra,* to be considered in fashioning equitable relief designed to vindicate federal rights. First, the remedy corresponds to the nature of the violation, inasmuch as it seeks to address the actual harm caused by petitioner's unlawful conduct, *i.e.*, the deprivation of benefits due respondents. Second, the notice relief is aimed at accomplishing "the ultimate

[40]Weinbert, *supra* n.39 at 1025.

objective of the remedy [which] is to make whole the victims of unlawful conduct," *Id.* at 280 n.15. Each class member who has been denied benefits will be placed on a par with every other public aid recipient in Illinois by being potentially able to recover those benefits through the state's "fair hearing" procedures, unless he or she individually is subject to a defense. Such a process, given the constraints of the Eleventh Amendment, fulfills to the maximum extent possible this Court's mandate that, "where a legal injury is of an economic character, the 'general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.' " *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), quoting *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867). Third, principles of federalism will be preserved because the State of Illinois, and not the federal courts, will determine who, if anyone, is entitled to back benefits. The decisions will be made pursuant to the State's own procedures and regulations.

The relief approved by the court of appeals, *en banc,* in this case is unquestionably far less sweeping and less intrusive than that in *Milliken.* Notwithstanding the Eleventh Amendment, *Milliken* approved specific expenditures which would, *inter alia,* compensate injured plaintiff class members for "a past breach of a legal duty on the part of the defendant state officials." *Jordan I* at 668. Had the district court in that case also ordered the state officials to send notices to the members of the plaintiff class advising them to seek the assistance, if they so desired, of state officials in securing the available remedies, i.e., the compensatory programs, no principled basis would support a holding that the Eleventh Amendment barred such

relief.[41] Yet that is the petitioner's claim here: that the Eleventh Amendment bars the federal court from notifying injured persons of remedies available to them for redress of their injuries.

In the absence of the notice relief at issue, the federal court would leave totally unredressed the harm created by the loss of benefits resulting from petitioner's policies. As a result, the remedy would not comprehend the entire "scope of the constitutional violation," (*Milliken,* 433 U.S. at 280) nor would the relief in any sense be "*remedial* in nature." *Id.* at 280. In fact, absent the notice relief, the members of the class actually harmed by the petitioner's action would receive no relief whatsoever. Moreover, the state's preexisting regulatory scheme, created for the very purpose of ferreting out and correcting the underpayment of benefits to eligible recipients, as described *supra* at pp. 16-19, would be ignored by the decree as it stood after *Jordan I.*

The decree does not place the federal courts in the position of requiring the payment of any money out of the state treasury, but instead the notice relief is ancillary to the declaratory and injunctive relief already approved in *Jordan I. See Hutto v. Finney,* 46 U.S.L.W. 4817, 4820

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[41] *Cf. United States v. Texas,* 447 F.2d 441 (5th Cir. 1971), *stay denied sub nom. Edgar v. United States,* 404 U.S. 1206 (Black, Circuit Justice, 1971), upholding relief requiring the defendants to distribute a bulletin "designed to notify faculty, staff and patrons of local school districts of the availability of complaint and grievance procedures and to inform them of how to utilize these procedures." *Id.* at 448. The Fifth Circuit also, however, vacated a provision for state officials mandating local school boards to provide back pay, "with the provision that the Order shall not be construed to have any effect upon the state or federal remedies of Faculty or Staff for discriminatory action . . . ." *Id.* at 442.

(June 23, 1978). The injunction entered merely guarantees that the administrative strucure created by the State prior to the initiation of this litigation, will be utilized to fulfill the adjudicatory purposes for which it is intended. No remedy could better preserve the sovereign position of the State of Illinois.

This Court has reiterated time and again that "state and local authorities have primary responsibility for curing constitutional violations." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4819 n.9 (June 23, 1978); *see Milliken,* 433 U.S. at 281; *Brown v. Board of Education,* 349 U.S. 294, 299 (1955). Although, as discussed in Section IB *supra* p. 16, the state courts were not available as a forum for adjudicating the threshold question of whether petitioner's regulations and practices with respect to AABD applications were contrary to federal law, the State of Illinois has established an administrative forum designed specifically to permit corrective action. This preexisting administrative enforcement mechanism is an integral part of a relatively complex federal-state regulatory system, which operates to protect the State's strong and legitimate interest in maintaining the fiscal and administrative integrity of its public assistance programs and, at the same time, to "secure for every applicant and recipient the aid and services to which he may be entitled," Ill. Rev. Stat., ch. 23, §11-2 (1977).

"The concept of federalism requires 'sensitivity to the legitimate interests of *both* State and National governments,' " *Hicks v. Miranda,* 422 U.S. 332, 356-357 (Stewart, J., dissenting, quoting from *Younger v. Harris,* 401 U.S. at 44) (emphasis in original), and requires the affirmance of the notice relief approved by the court below. To hold that the Eleventh Amendment bars such relief

would result in a perversion of the Eleventh Amendment "Our Federalism," and the congressional mandate embodied in Section 1983.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

VS.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONER

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3B MOORE'S FEDERAL PRACTICE, § 23.72 (2d ed. 1974) 9

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

vs.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE STATE PETITIONER

I.

RETROSPECTIVE NOTICE RELIEF WHICH TRIGGERS FAIR HEARING REQUESTS FOR RETROACTIVE BENEFITS VIOLATES THE LAW OF THE CASE AS ESTABLISHED IN *EDELMAN V. JORDAN.*

Plaintiffs unsuccessfully argue that the *en banc* order simply involves a notice to class members respecting the right to request a fair hearing to attempt to recover benefits, an issue "neither presented nor decided in *Jordan I* and therefore the doctrine of the law of the case is not properly invoked." (Resp. Br. p. 11) This assertion is premised upon a narrow reading of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), as limited to an "award of damages or restitution" or "relief which compensates *per se* for the Illinois official's violation of the law." (Resp. Br. p. 14)

Such a reading of *Edelman*, particularly in the very litigation in which the Eleventh Amendment's bar was successfully raised, is inappropriate. Plaintiffs wholly ignore that Mr. Justice Rehnquist's synopsis of Eleventh Amendment jurisprudence emphasized as a guiding principle this Court's statement in *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) to the effect:

> "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." 415 U.S. at 663.

The question to be answered therefore in every Eleventh Amendment controversy is whether the relief sought is against the non-consenting state, that is, whether the state is "the real substantial party in interest." Relief in the form of damages, restitution or compensation *per se* is

but one example of the types of relief which implicate the state as the real party in interest.

"Behind the words of constitutional provisions are postulates which limit and control", *Monaco* v. *Mississippi*, 292 U.S. 313, 322 (1934), and one such postulate of the doctrine of sovereign immunity is whether the relief requested "will require affirmative action by the sovereign", *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 at 691 n. 11 (1949). Put another way, will the relief prayed for entail "interference with governmental property" or bring "the operation of governmental machinery into play."? Id. at 715 (Justice Frankfurter, dissenting). These principles of sovereign immunity are fully applicable to the relief in question here.

It is submitted that retrospective equitable relief in the form of a notice designed to trigger fair hearings which may result in retroactive monetary awards also implicates the state as the real party in interest and thus violates the bar of the Eleventh Amendment and the principles of sovereign immunity.

There are several reasons why this is true under the circumstances of this case. First, Judge Wood, writing for the Seventh Circuit, expressly conceded in the *en banc* decision that "the state, not merely an officer, would be directly involved in any relief granted." *Jordan* v. *Trainor*, 563 F. 2d 873, at 875 (7th Cir. 1977). Second, even in the absence of such a concession, the record here shows that the relief will significantly intrude upon the operations of state government, including the mailing of over 20,000 notices, handling requests for hearings, full evidentiary hearings, final administrative decisions on each appeal, judicial review in the event of adverse administrative rulings, and payment of substantial state funds if Plaintiffs ultimately prevail.

Third, notice relief is a mere subterfuge by which Plaintiffs hope to achieve, by the exercise of federal judicial power, a monetary award which this Court has declared to be prohibited by the constitution. Fourth, notice relief is not permissible prospective injunctive relief against the officer, since it will result in a situation which "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman,* 415 U.S. at 668.

Fifth, Petitioner Quern has not and is not conducting himself in a manner which violates the rights of the plaintiff class or ignores the obligations of the state. This lawsuit arose in 1971 and involved rights and obligations under Title XVI of the Social Security Act, (AABD program). During the period from July 1, 1968 to April 17, 1971, Petitioner's predecessor four times removed failed to abide by federal time standards for promptly acting upon applications for assistance. As of April 17, 1971, state officials were enjoined to conform their conduct to the requirements of 45 C.F.R. § 206.10(a)(3). Federal requirements with respect to notice of the right to a fair hearing, 45 C.F.R. § 205.10, were not then (A. 6, Complaint) and are not now (A. 31, Motion to Require Notice to Members of the Plaintiff Class) in issue.

Moreover, as of January 1, 1974, any rights and obligations under former Title XVI with respect to notice were extinguished due to the repeal by Congress of the AABD program and its replacement by the wholly federally funded Supplemental Security Income program. See, Pub. L. 92-603, Title III, § 301, 86 Stat. 1465. If this Court approves Plaintiffs' motion for notice relief, and should retroactive benefits ultimately be paid to the plaintiff class, there is little likelihood that the Federal government would recognize an obligation to provide federal financial participation for assistance payments relating to a defunct program. For Illinois to bear the entire cost of retroactive AABD payments is not consistent with principles of "cooperative federalism" which characterized former Title XVI of the Social Security Act.

Finally, Public Assistance programs in Illinois are funded by means of annual appropriations measures and payment of assistance benefits by state warrants is limited by provisions of state law. *See, Ill. Rev. Stat.,* Ch. 15, §§ 201, 210.04, 210.16, State Comptroller Act; Ch. 130, §§ 10, 11; State Treasurer's Act. In particular, the Director of Public Aid may not request the Comptroller to draw, or the Treasurer to make payments from funds appropriated for a current fiscal year for an outstanding obligation incurred during a prior fiscal year without the express authorization from the legislature. *Ill. Rev. Stat.,* Ch. 127, § 161 (1977); 1976 *Illinois Attorney General's Report and Opinions,* No. S-1053. As a result of the lapsing of the Public Aid appropriations for fiscal years 1968, 1969, 1970 and 1971, members of the plaintiff class would be required to resort to filing claims against the state in the Illinois Court of Claims, *Ill. Rev. Stat.,* Ch. 37, § 439.1 *et seq.* (1977). In this regard, it should be noted that awards by the Court of Claims are not judicial orders, but mere recommendations to the Illinois General Assembly which is free to appropriate the funds or not as it deems appropriate. *See, Siefert* v. *Standard Paving Co.,* 64 Ill. 2d 109, 335 N.E. 2d 537, 541-42 (1976).

In sum, the relief which plaintiffs seek is directed against the State of Illinois and not Director Quern as the state is "the real, substantial party in interest". Notice relief as envisioned by the Court of Appeals, while not consti-

tuting compensation *per se,* will necessitate "affirmative action by the sovereign" and will bring into play "the operation of governmental machinery." Such relief runs afoul of the law of the case as established by this Court in *Edelman.*

II.

THIS CASE DOES NOT INVOLVE A STATUTORY OR REGULATORY RIGHT TO NOTICE

Respondents in Section IB of their brief attempt to justify the notice relief on the basis of Federal and State law. But this case was neither brought nor developed as a statutory or regulatory right to "notice" case based on any contention that applicants for AABD had not received proper notice of their entitlement to benefits or of their right to an agency appeal.

The complaint charged that the Illinois Department of Public Aid was not processing AABD applications within the time frame required by federal regulations under the Social Security Act, and further, that when grants were authorized, they commenced only with the month in which an application was approved. Count I is based solely on the statutory ground while Count II is the constitutional equal protection claim and also relies on a State statute. See also *Edelman* v. *Jordan, supra,* at 653-656 n. 1-4.

Nowhere in the complaint, or for that matter, in any of the orders or judgments or decisions until motion on remand in the District Court, is there any reference to any of the statutory and regulatory notice provisions cited in respondents' brief.

Respondents cite *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) in support of their argument of a statutory mandate and a guarantee of due process (Respondents' brief, p. 17). But due process rights have never been an element of this case.

The only constitutional claim in the complaint was an equal protection argument, which this Court said was not "wholly insubstantial" under *Hagans* v. *Lavine,* 415 U.S. 528 (1974), and therefore enough for pendent jurisdiction over the statutory claim. *Edelman* v. *Jordan, supra,* at 653, n. 1.

It was and is *totally irrelevant* whether public aid recipients in Illinois can bring class actions. (Resp. Br. p. 16). The issue before this Court is whether the Eleventh Amendment is a bar to an equitable order to provide notice to the class sanctioned by the Court of Appeals *en banc.* The availability of relief in the State courts, whether to a class or only to individuals separately under the Illinois Administrative Review Act, Ill. Rev. Stat. (1977), ch. 110, § 264-279, is not before the Court.

So also is there no relevancy to the citation of the Illinois Appellate Court decision of *Isabell* v. *Department of Public Aid,* 18 Ill. App. 3d 868, 310 N.E. 2d 742 (1974) (respondents' brief, pp. 18-19). It may in fact be that if this Court should sustain the notice relief approved below, and class members bring administrative fair hearings, that *Isabell* may be material on whether any limitations bar these appeals. But that affects only the possible ultimate result, and not whether the District Court could order any such notice.

Petitioner similarly contends that there is no relevancy to the citation of the case of *Johnson* v. *Dept. of Public Aid,* 3 Ill. App. 3d 1045, 279 N.E. 2d 791 (1972) at p. 18 of respondents' brief. The case is cited for the proposition that the State of Illinois has in the exercise of its sovereign power consented to suits in the state courts for "corrective payments" of money from the state treasury. If it were material, that case is not the law, for the Illinois Supreme Court has since held in a welfare case that while

the state courts may find that plaintiff is entitled to payments withheld, they may not enter a monetary judgment against the State. *Campbell* v. *Department of Public Aid,* 61 Ill. 2d 1, 329 N.E. 2d 225 (1975).

It is significant that the fair hearing statute (42 U.S.C. § 1382(a)(4), the regulation for corrective payments retroactively after fair hearings, (45 CFR § 205.10(a)(18), and the regulation making federal financial participation available for retroactive assistance (45 CFR § 205.10(b)(2) cited by respondents, were all relied upon by Mr. Justice Marshall in dissent (joined by Mr. Justice Blackmun) in *Edelman* in support of the position that the Federal Courts could order the States to make retroactive payments to public aid recipients. *Edelman* v. *Jordan, supra,* at 692-693. The majority felt otherwise. *Edelman* v. *Jordan, supra,* at 674-675, n. 17.

III.

NOTICE RELIEF UNDER RULE 23(d)(2) F.R.C.P. WAS NOT AN ISSUE BELOW AND IS NOT REQUIRED FOR PROSPECTIVE RELIEF.

At no time from the very beginning of this case in January 1971 until the filing of their brief in this court in August 1978 had Plaintiffs ever asserted the right to notice to the class under any of the provisions of F. R. Civ. P. 23.

The parties differ as to whether the relief granted by the District Court was on behalf of a class which had in fact been certified.* Neither the District Court in ordering notice to the class, nor the Court of Appeals below *en banc,* ever mentioned Rule 23 in their opinions. The Court

*See Petitioner's Brief at 6, n. 4, 25, 27; Respondent's Brief at 14-15, n. 5.

of Appeals considered the constitutionality of "a mere explanatory notice" advising applicants that there was a state administrative procedure available to them. *Jordan* v. *Trainor,* 563 F. 2d 873, 875 (1977) (A. 67).

It is important to note that notice under Rule 23(d)(2) is a purely discretionary provision for the members of a Rule 23(b)(2) class. See, 3B MOORE'S FEDERAL PRACTICE, § 23.72 (2d ed. 1974). In fact, there is a question whether a class was ever certified under Count II. Assuming that there was a properly certified class, it would certainly come under the definition of a (b)(2) class:

> (2) the party opposing a class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; (See, Preliminary Injunction Order, par. 8, A. 19).

It certainly was not a (b)(3) class, or individual notice would have had to be sent to all members of the class who could be identified through reasonable effort. Payment for the notice would have been at the expense of the Plaintiffs. *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 180 (1974).

None of the cases cited by Respondent is in point on a discretionary notice. Among these cases, *Greenfield* v. *Villager Industries, Inc.,* 483 F. 2d 824 (3rd Cir. 1973); *Turoff* v. *Union Oil Company,* 51 F.R.D. 51 (N.D. Ohio 1973); and *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538 (1974) all involved 23(b)(3) classes. The issue in *Greenfield* was whether the notice of proposed settlement satisfied the requirements of Rule 23(c)(2). Both *Turoff* and *American Pipe* were motions for class certification and both were denied. In *Rothman* v. *Gould,* 52 F.R.D. 494 (S.D. N.Y.

1971), also cited by Respondent, there was a motion that the action not be maintained as a class. The Court found that notice was necessary so that the "class members" could oppose the motion or seek to be substituted as representatives. Nor is *Doe* v. *General Hospital,* 434 F. 2d 427 (D.C. Cir. 1970), the only other case cited by Respondent, analogous authority. The facts in that case involved a motion for civil contempt for violation of a preliminary injunction. The Court remanded with instructions that if the trial Court should find harm to the class it should consider whether affirmative action should be required and whether relief might be fashioned under Rule 23(d)(2).

Respondents' argument for a 23(d)(2) notice completely overlooks the fact that if there were ever a time for such a notice, it was not by the District Court on remand after the decision of this Court in *Edelman* v. *Jordan.* Conceivably notice might have been ordered sent when the case first began, had the complaint alleged a notice violation under federal or state law. But there was no possible occasion for notice by the District Court on remand from the decision of this Court. As far as the Federal Courts were concerned, the case was over, except for modifying the prospective portions of the injunction to conform to then existing federal time standards. (A 29-A.30). The notice Respondent seeks has nothing to do with a class action under Rule 23. Possible administrative avenues of relief were purposefully ignored by Plainitiffs (Complaint, par. 27 and 39, A. 12, A.14) when they elected to file in Federal Court. Respondents are straining beyond any rational extent both the letter and spirit of Rule 23 by contending that the notice they seek to uphold can come under that Rule.

IV.

PRINCIPLES OF SOVEREIGN IMMUNITY AND FEDERALISM ARE VIOLATED BY THE NOTICE RELIEF ENVISIONED BY THE APPELLATE COURT.

A.

The Principles Of Sovereign Immunity Embodied In The Eleventh Amendment Are Not Limited To Suits For Monetary Relief.

For the reasons set forth in Part I, *supra,* notice relief designed to trigger fair hearings, state judicial review, and possible legislative action fails to "respect" the rights of the sovereign to be immune from suit without its consent. Contrary to Plaintiffs' assertions (Resp. Br. p. 23-31), notice relief substantially "intrudes" upon institutions of state government by requiring affirmative action by the sovereign to secure for Plaintiffs monetary relief directly barred by the principles of sovereign immunity as articulted by this Court in *Edelman.*

Those principles are not limited as Respondent suggests (Resp. Br. p. 27), to cases seeking to *directly* intrude upon the treasuries of the States. As Mr. Justice Stewart has observed in a different context certain types of claims are barred by sovereign immunity because they "necessarily involve claims against the Treasury". *Brown* v. *General Services Administration,* 425 U.S. 820, 826 (1976) (a suit for promotion by a federal employee) As in that case, this Court should not be required as a result of artful pleading to suspend its disbelief that as long as the suit is nominally against the officer the principles of sovereign immunity are not thereby implicated. *Id.,* at 833.

Notice relief constitutes an indirect invasion of the state treasury and thus, the principles of sovereign immunity,

which apply to the federal and state sovereigns alike, are sufficiently broad to bar the relief here. Even were this case not one seeking monetary relief indirectly, the principles of sovereign immunity would be violated anyway since the mandate of the court would affirmatively affect the administrative and judicial, if not legislative, apparatus of the state. This Court's ruling in *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949) precludes such a result.

B.

The *Edelman* Court's Distinction Between Prospective And Retrospective Relief Advances The Underlying Notions Of Comity And Federalism.

Edelman v. *Jordan*, 415 U.S. 651 (1974) and *Milliken* v. *Bradley*, 433 U.S. 267 (1977) have restructured the features of "Our Federalism" by recognizing that relief which looks to "conduct and consequences completed in the past", *Milliken* v. *Bradley, supra*, 97 Sup. Ct. 2749, 2762 n. 21, is out of harmony with the prospective-compliance exception to sovereign immunity which had its genesis in *Ex Parte Young*, 209 U.S. 123 (1908).

Respondent's notions of federalism (Resp. Br. pp. 32-47) would, if accepted by this Court, undermine rather than serve that important doctrine. The distinction between prospective and retrospective relief balances the competing interests of federal supremacy and state sovereignty by giving force and effect to the terms of both the Eleventh and Fourteenth Amendment to the Constitution of the United States. Plaintiffs would have this Court severly limit the scope of the Eleventh Amendment while expanding the Fourteenth Amendment. Not only is such a result impermissible under established rules of constitutional construction, but it is wholly unsupported by the record in this case which involved at its inception primarily a supremacy clause issue pendant to a Fourteenth Amendment claim never reached nor resolved by any court below.

Plaintiff's charge, that the distinction between prospective relief and retrospective relief is "flawed" (Resp. Br. p. 34), is a thinly disguised effort to turn back the clock of "Our Federalism" to some pre-*Edelman* time. As the *Milliken* v. *Bradley* court found, the distinction is one that works and can be fairly shaped to the contours of a given case to afford appropriate prospective relief. Under any fair appraisal of the relief sought here, notice to members of the plaintiff class, with respect to rights under a terminated federal state/program, is retroactive, essentially compensatory and disruptive of sound principles of federalism.

V.

42 USC § 1983 CANNOT BE INTERPRETED TO PERMIT RETROSPECTIVE NOTICE RELIEF AGAINST A NONCONSENTING STATE UNDER *EDELMAN*.

When Respondent was previously before this Court in *Edelman*, the argument was made that the Fourteenth Amendment worked a sufficient limitation upon the Eleventh Amendment so as to permit an award of equitable restitution against the State.

Respondent now argues that not the Fourteenth Amendment, but a statute, 42 U.S.C. § 1983, is itself a limitation upon the use of the Eleventh Amendment by a state to assert its sovereignty.

Respondent relies on three recent decisions of this Court. The first is *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). There this Court upheld an award for retroactive retirement

benefits payable from the State Treasury provided for under Title VII. *Edelman* v. *Jordan* did not apply because Title VII was passed under the enforcement power granted to Congress under § 5 of the Fourteenth Amendment, and 'the threshold fact of Congressional authorization' to sue the State as employer was clearly present.

Respondent relies in large measure on *Monell* v. *Department of Social Services,* —— U.S. ——, 98 S. Ct. 2018 (1978), which held that municipal corporations could be liable in damages under § 1983. But that case specifically did not pass on the question of the immunity of a state for retroactive damages under the Eleventh Amendment. 98 S. Ct. at 2035, n. 54. See also n. 55 at 2036. Moreover, the *en banc* decision of the Seventh Circuit does not rest upon a conclusion that the term "person" for purposes of § 1983 includes sovereign states, as opposed to state officials, within its ambit. That issue is not the issue before this Court on Petitioner's Writ for Certiorari.

Hutto v. *Finney,* —— U.S. —— 98 S. Ct. 2565, (1978) did not answer the specific question either. The District Court award of attorney's fees based on bad faith, was upheld against the asserted defense of the Eleventh Amendment, by going back to the distinction between prospective and retroactive relief of *Edelman* v. *Jordan.*

While Respondent tries to use *Hutto* to shore up his arguments for broad equitable powers to the Federal Courts, the case says that these broad powers are available against state officers in their official capacities for prospective relief only.

> And in *Edelman* v. *Jordan* (citation omitted), when the Court held that the Amendment grants the States an immunity from retroactive monetary relief, it reaffirmed the principle that state officers are not immune from *prospective* injunctive relief.
>
> • • •

> . . . In exercising their *prospective* powers under *Ex parte Young* and *Edelman* v. *Jordan,* federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. . . . Id. at 2573-2574 (emphasis added).

So also the affirmance of the award of attorney's fees against the state officials by the Court of Appeals under the Civil Rights Attorney's Fees Awards Act of 1976 (Pub. L. No. 94-4459, codified in 42 U.S.C. § 1988) does not rule directly on the question now before this Court.

The Attorney General of Arkansas did not question the power of Congress to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. He contended, however, that even a plain indication of legislative intent to exercise that power to authorize fee awards against the state officials was not enough, that Congress had to enact express statutory language making the States liable if it wished to abrogate their immunity.

This Court in upholding the award of attorney's fees under the Act did not say this contention was wrong, but distinguished the cases:

> But these cases concern retroactive liability for prelitigation conduct rather than expenses incurred in litigation seeking only prospective relief. Id at 2576.

The Court stressed that costs (and thus attorney's fees under the Act) were different from "retroactive liability for prelitigation conduct."

> Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity . . . The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants. Id. at 2576.

> This conclusion is consistent with the reasons for requiring a formal indication of Congress' intent to abrogate the State's Eleventh Amendment immunity. Id. n. 27 at 2577.

Defendant submits that it is anomalous for Plaintiffs to argue that relief in the form of a notice designed to secure retroactive benefits is permissible under § 1983 while such benefits themselves cannot be awarded under the Fourteenth Amendment against a nonconsenting state. No post-*Edelman* decision of this Court even remotely supports Plaintiffs' theory.

CONCLUSION

Petitioner Quern respectfully requests this Court to uphold the integrity of its prior decision in this case and to reverse the *en banc* decision of the Seventh Circuit Court of Appeals with directions to bring this extensively litigated case to an end without further attempts to relitigate issues foreclosed or evade the bar of the Eleventh Amendment.

Respectfully submitted,

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NO. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to James L. Trainor,

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-vs-

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

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BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, Donald P. Bogard, Chief Counsel and William G. Mundy, Deputy Attorney General, pursuant to Rule 42 of the Rules of the

Supreme Court of the United States, submits its amicus curiae brief on the merits in support of the Petitioner in the above-entitled cause.

INTEREST OF THE AMICUS

The State of Indiana submits this brief because the questions presented by the State of Illinois are equally vital to Indiana and all other states in the Union. The decision of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) was beyond the scope of the Order of Remand from this Court and contrary to the great weight of established authority by this Court.

In Edelman v. Jordan, 415 U.S. 651 (1974), this Court held, inter alia, that the Eleventh Amendment to the Constitution of the United States is a bar to an order by a federal court for payment of retroactive benefits wrongfully withheld by a state. Pursuant

to that Amendment, Indiana, Illinois, and all other states, are guaranteed the right to be exempt from federal judicial encroachment in their affairs, and this Court has so held on numerous occasions.

However, the decision of the Seventh Circuit attempts to do indirectly what this Court has specifically prohibited in this case. Indiana believes that any attempt to circumvent the Constitutional guarantees to states must be opposed, especially when those attempts pose the likelihood of serious financial consequences to state treasuries.

ARGUMENT

This case was before this Court in 1974, styled as Edelman v. Jordan, supra. The decision of this Court was that the Eleventh Amendment acted as a bar to an

order issued by a federal district court for the payment of retroactive welfare benefits.

On remanding this case to the Seventh Circuit, this Court stated, 415 U.S., at 679:

> ...The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion. (Emphasis supplied.)

The Seventh Circuit on October 29, 1974 in turn remanded to the District Court. The District Court, upon the motion of the respondent to require notice to members of the plaintiff class, granted such motion and ordered officials of the Illinois Department of Public Aid to send a written notice entitled "Notice of right to appeal denial of benefits" to each member of the plaintiff class whose application for welfare assistance

was delayed in processing during the period between 1968 and 1971. Upon appeal to the Seventh Circuit by the petitioner state official, a three judge panel unanimously reversed the order of the District Court and held that the Eleventh Amendment constituted a bar to such order, and further found that the order attempted to accomplish by indirection an end prohibited by this Court.

The Seventh Circuit thereafter granted Respondent's petition for rehearing en banc and in a majority decision (Judges Pell, Tone, and Bauer dissenting) held that while the precise language used by the District Court would controvert the Eleventh Amendment, "a mere explanatory notice" to applicants advising them of procedures to obtain retroactive benefits would not be barred by the Eleventh Amendment. Wholly aside from

the impropriety of the Seventh Circuit fashioning a new notice on appeal, its action is in clear circumvention of this Court's direction in Edelman v. Jordan, supra.

In speaking to the impropriety of the District Court's original decree in this case as violating the Eleventh Amendment, this Court stated:

> ...It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials. 415 U.S., at 669.

It is beyond dispute that the notice contemplated by the Seventh Circuit has as its basis a past breach of a legal duty on the part of state officials, since that breach allegedly occurred in the period between 1968 and 1971 when applications for assistance were delayed in processing. Moreover, the substance of the order which the Seventh Circuit opines would not be barred by the Eleventh Amendment is to provide the plaintiff class a vehicle by which the members might recover monies from the Treasury of the State of Illinois, and is clearly not a "necessary consequence of compliance in the future with a substantive federal question." See, Fanty v. Commonwealth of Pennsylvania, Dept. of Public Welfare, 551 F. 2d 2 (3rd Cir. 1977).

The Seventh Circuit's rationale that the envisioned "mere explanatory notice" would not violate the proscriptions of the Eleventh Amendment is highly suspect. The Court first notes that the notice would not be a form of "equitable restitution," and thus acceptable under the Eleventh Amendment. The Circuit Court reads this Court's opinion in Edelman v. Jordan, supra, far too narrowly.

Indeed, while this Court held that relief labeled "equitable restitution" was in actuality indistinguishable from an award of money damages against the State and thus constitutionally impermissable, it did not impliedly suggest that other forms of equitable relief, which in reality are designed to effectuate the same result, would be permissable. This Court has noted that other forms of equitable relief may be barred by Eleventh Amendment. Hogood v. Southern, 117 U.S. 52 (1886); In re Ayers, 123 U.S. 443 (1887).

This Court has permitted equitable relief against a State in very limited circumstances, even though such relief might have great impact on a state's treasury. Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). It was noted, however, that:

> ...the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissable and often an inevitable consequence of the principle announced in Ex parte Young, supra. (Emphasis supplied.) Edelman v. Jordon, 415 U.S., at 668.

Just as this Court found the lower courts' evasion of the Eleventh Amendment improper in the earlier stage of this litigation, so should it find here. The District Court and the Seventh Circuit seem intent on providing retroactive, as opposed to prospective, relief to the plaintiff class. This

Court has never sanctioned such relief, as constitutionally permissable and to do so here is to invite other federal courts to assist in artful devices to avoid the plain proscriptions of the Eleventh Amendment.

The amicus would submit that the actions of the Seventh Circuit demonstrate a disrespect of this Court's directions in Edelman v. Jordan, supra, and Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945), as well as the principles of federalism which were recently reaffirmed in National League of Cities v. Usery, 426 U.S. 833 (1976). The amicus would urge this Court to reject the Seventh Circuit's attempt to chip away the continued viability of the Eleventh Amendment, and reverse the decision of that Court.

CONCLUSION

For all the foregoing, the Amicus Curiae respectfully prays this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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